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Vol. I.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1045.~~ ~~596~~ 258

HENRY CURTNER, J. WEST MARTIN, THE BANK OF CALIFORNIA, ALFRED E. WHITAKER, ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 22, 1889.

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1 In the Circuit Court of the Ninth Circuit of the United States of America for the District of California.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER, SAMUEL DAVIS, SAMUEL B. MARTIN, J. West Martin, W. D. English, John R. Deardorff, Anna T. Taylor, Alfred E. Whitaker, George G. Taylor, F. S. Wensinger, John O'Hara, Rasmus Bjorn, Henry F. Crane, Thos. Newell, Le Grand Morehouse, Andrew S. Barron, James Barron, Bank of California, a Corporation under the Laws of the State of California; Franz Leberier, Patrick Armstrong, Margaret Armstrong, His Wife; Garrison Gerst, Charles G. Johnston, Sr., Martin Durand, Anthony Thompson, Rasmus H. Carstenson, Frances Schiveer, John Hinkle, Thomas W. Moore, Joseph Doe, Richard Roe, Thomas Roe, Chas. Roe, Frank Roe, and Daniel Roe, Defendants. } In Equity.

Amended Bill.

To the judges of the circuit court of the United States of America in chancery sitting in and for the district of California:

Benjamin H. Brewster, Attorney General of the United States of America, on behalf of the United States of America, by leave of this honorable court here first had and obtained, files this his amended bill in equity against Henry Curtner, Samuel Davis, Samuel B. Martin, J. West Martin, W. D. English, John R. Deardorff, Anna T. Taylor, Alfred E. Whitaker, George G. Taylor, F. S. Wen-
2 singer, John O'Hara, Rasmus Bjorn, Henry F. Crane, Thomas Newell, Le Grand Morehouse, Andrew S. Barron, James Barron, Bank of California, a corporation under the laws of the State of California; Frank Leberier, Patrick Armstrong and Margaret Armstrong, his wife; Garrison Gerst, Charles G. Johnston, Sr., Martin Durand, Anthony Thompson, Rasmus H. Carstensen, Frances Schiveer, John Hinkle, Thomas W. Moore, Joseph Doe, Richard Roe, Thomas Roe, Charles Roe, Frank Roe, and Daniel Roe, citizens of the United States of America and residing in the county of Alameda and in the county of Contra Costa and in the State of California, as your orator is informed and believes, but in which of said two counties each of said defendants respectively has his place of abode your orator has, after diligent inquiry, been unable to ascertain, and complains and says:

C. P. R. R. Co. of California, a corporation.

1. That on the 28th day of June, A. D. 1861, the "Central Pacific Railroad Company of California" was a corporation duly organized under and by virtue of the laws of the State of California for the pur-

pose of constructing, operating, and maintaining a railroad and telegraph line extending from the city of Sacramento, in the State of California, to the eastern boundary line of said State, with the necessary and proper branches and extensions thereof; that said company, under and by virtue of an act of the Legislature of the State of California, approved on April 17th, A. D. 1863, did, on the 8th day of October, A. D. 1864, file in the office of the secretary of state of the State of California its amended articles of association, wherein and whereby said Central Pacific Railroad Company of California became by name and style "the Central Pacific Railroad Company of California," and remained and continued to be a corporation as last aforesaid until the 22nd day of June, A. D. 1870, when said company was merged, amalgamated, and consolidated with "the Western Pacific Railroad Company" under the corporate name and style of the "Central Pacific Railroad Company," as is hereinafter more particularly set forth.

Amended act of the C. P. R. R. Co.

3

W. P. R. R. Co., a corporation.

2. That on the thirteenth (13th) day of December, A. D. 1862, the Western Pacific Railroad Company was a corporation duly organized under and by virtue of the laws of the State of California for the purpose of constructing, owning, and maintaining a railroad and telegraph line along its road from a point at or near the city of San Jose, in the State of California, connecting at such point with the "San Francisco and San Jose Railroad Company's railroad," and from thence passing through the counties of Santa Clara, Alameda, Contra Costa, San Joaquin, and Sacramento to the city of Sacramento, all in the State of California, and at the city of Sacramento to connect with the "Central Pacific Railroad Company of California's railroad," so that when completed there would be a continuous line of railroad from the city of San Francisco to the eastern boundary line of said State, and that said "The Western Pacific Railroad Company" remained and continued to be a corporation as aforesaid until the twenty-second (22nd) day of June, A. D. 1870, when said company was under the laws of the State of California merged, amalgamated, and consolidated with "the Central Pacific Railroad Company of California" under the name and style of the "Central Pacific Railroad Company," a corporation then and at the present time duly organized and existing under the laws of the State of California, and the said "The Central Pacific Railroad Company of California" and the said "The Western Pacific Railroad Company" did, on said 22d day of June, A. D. 1870, each for itself sell, assign, transfer, grant, bargain, release, and convey to said "Central Pacific Railroad Company," its successors and assigns forever, all its property, real, personal, and mixed, of every kind and description, and all rights, privileges, and franchises, corporate and

The C. P. R. R. Co. of Cal. and the W. P. R. R. Co. consolidated under the name of C. P. R. R. Co.

4

otherwise, held, owned, or claimed by said parties or either of them, in possession or expectancy, either at law or in equity.

The objects of C. P. R. R. Co.

3. That the objects and purposes of said "Central Pacific Railroad Company" formed by said consolidation and amalgamation were to purchase, construct, own, maintain, and operate the railroad and telegraph lines of said "The Central Pacific Railroad Company of California" and of said "The Western Pacific Railroad Company" as they are hereinbefore respectively set forth.

Your orator further shows:

Union Pacific R. R. Co. incorporated.

4. That on the 1st day of July, A. D. 1862, the Congress of the United States of America by its act of that date created and erected Walter S. Burgess, William P. Blodget, Benjamin H. Cheever, and others, their associates and successors, into a body corporate and politic in deed and in law by the name, style, and title of "the Union Pacific Railroad Company," the purpose and object of which company was in said act declared to be the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for
5 postal, military, and other purposes.

C. P. R. R. of Cal. authorized to build, etc.

5. That said "Central Pacific Railroad Company of California" was by the act last mentioned authorized to construct a railroad and telegraph line from the Pacific coast at or near San Francisco or the navigable waters of the Sacramento river to the eastern boundary of California upon the same terms and conditions in all respects as were contained in said act of July 1st, A. D. 1862, for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California, meaning by the words "said railroad and telegraph line first mentioned" the line of railroad and telegraph to be constructed by "the Union Pacific Railroad Company" created by said act of July 1st, A. D. 1862.

The grant of land — the "U. P. R. R. Co."

6. That by said last-mentioned act there was granted to said "The Union Pacific Railroad Company," for the purpose of aiding in the construction of said railroad and telegraph line and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad on the line thereof and within the limits of ten miles on each side of said road not sold, reserved, or otherwise disposed of by the United States and to which a pre-emption or homestead claim may not have attached at the

time the line of said road should be definitely fixed. Said act also provided that all mineral lands should be excepted from
6 the operations of this act, but where the same should contain timber the timber thereon was granted to said company; and said act also further provided that all such lands so granted which should not be sold or disposed of by said company within three years after the entire road should have been completed should be subject to settlement and pre-emption like other lands at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company; that the said Central Pacific Railroad Company of California did, in the month of November, A. D. 1862, file its assent to the said act of July 1st, A. D. 1862, under the seal of the company, in the Department of the Interior, at Washington; that said The Western "Pacific Railroad Company" and its successor, the "Central Pacific Railroad Company," did, within three years of the completion of said "Central Pacific Railroad Company's" road, sell and dispose of said lands hereinafter described and set forth to persons other than defendants.

C. P. R. R. Co. of Cal. assents to conditions of act.

Two years to file map of general route; land to be withdrawn.

7. That by said last-mentioned act it was further provided that within two years after the passage thereof said company should designate the general route of said road as near as might be, and should file a map of the same in the Department of the Interior; whereupon the Secretary of the Interior should cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; that the Congress of the United States of America did by its act approved July 2nd, A. D. 1864, amendatory of said act of July 1st, A. D. 1862, extend the
7 time for designating the general route of said railroad and of filing the map of the same for the further term of one year from the time designated in said act of July 1st, A. D. 1862, to wit, until the 1st day of July, A. D. 1865.

C. P. R. R. Co. of Cal. assigns to the W. P. R. R. Co.

8. That on the thirty-first day of October, A. D. 1864, by an instrument in writing, duly made and delivered, said "The Central Pacific Railroad Company of California," for a valuable consideration, did assign, transfer, and quitclaim unto the said "The Western Pacific Railroad Company" and to their successors and assigns the right to construct, own, maintain, and operate all that portion of the line of railroad and telegraph which said act of Congress of July 1st, 1862, authorized and empowered "the Central Pacific Railroad Company of California" to lay out, locate, construct, furnish, maintain, and enjoy, lying between the city of Sacramento, through or near the city of Stockton, and a point on the "San Francisco and San Jose railroad" at or near the city of San Jose, there to connect with the line and track of the said "San Francisco

and San Jose railroad," and connecting at the city of Sacramento with the line and track of the railroad of the said "The Central Pacific Railroad Company of California," so as to form a continuous line of railroad with said other railroads; and "the Central Pacific Railroad Company of California" did then and thereby also assign, transfer, and quitclaim as aforesaid unto "the Western Pacific Railroad Company" all the rights, privileges, and powers of constructing, owning, maintaining, and operating the said railroad and telegraph line between the points named and described as
8 aforesaid which the said "Central Pacific Railroad Company of California" was authorized to construct, own, maintain, and operate by said act of Congress of July 1st, A. D. 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and of the act of Congress amendatory thereof, approved July 2d, A. D. 1864, and did then and thereby also assign, transfer, and quitclaim as aforesaid unto "the Western Pacific Railroad Company," their successors and assigns, all the rights, privileges, grants of land, donations, rights of way, loan of the credit of the Government of the United States of America, or the bonds thereof, and every other right and thing so far as relates or concerns to that portion of the said railroad and telegraph line extending from the city of Sacramento to a point on the San Francisco and San Jose railroad, near the city of San Jose, hereinbefore described and designated, acquired under and by virtue of said act of July 1st, A. D. 1862, and acts amendatory thereof.

Assignment ratified by Congress.

9. That the Congress of the United States of America did by its act approved on the 3d day of March, A. D. 1865, ratify and confirm said assignment to "the Western Pacific Railroad Company," made by "the Central Pacific Railroad Company of California" on the 31st day of October, A. D. 1864, as hereinbefore set forth, with all the privileges and benefits of the several acts of Congress relating thereto and subject to all the conditions thereof.

W. P. R. R. filed its assent and acceptance.

10. That said "The Western Pacific Railroad Company" did, on or before the 1st day of July, A. D. 1865, file in the
9 Department of the Interior, at Washington, its assent to an acceptance of the terms of said assignment and of said act of Congress, and did construct and complete twenty miles of their said road before the 1st day of January, 1867, and did construct and complete their entire road from San Jose to Sacramento, connecting at the latter point with the said "Central Pacific Railroad Company's" road and at the former point with the San Francisco and San Jose Railroad Company's road, on and over the general route designated as hereinafter stated, on or before December 29th, 1869.

Withdrawal of land by Sec'ty of Interior.

11. That said "The Central Pacific Railroad Company of California" and said "The Western Pacific Railroad Company" did, before the 30th day of January, A. D. 1865, designate the general route of the railroad of said companies and file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior did, on the 31st day of January, A. D. 1865, cause the lands within fifteen miles of said designated route of "the Western Pacific Railroad Company" to be withdrawn from pre-emption, private entry, and sale, and that the lands hereinafter described and set forth are a portion of the lands so withdrawn.

Act of '62 provided for issuance of patents by sections of 40 miles.

12. Your orator fu-ther shows that section four (section 4) of said act of July 1st, A. D. 1862, provided that whenever the said Central Pacific Railroad Company of California should have completed forty consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by the said act and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all other irons used in construction and equipment of said road to be of American manufacture of the best quality, the President of the United States should appoint three commissioners to examine the same and report to him in relation thereto; and if it should appear to him that forty consecutive miles of said railroad and telegraph line had been completed and equipped in all respects as required by said act, then, upon certificate of said commissioners to that effect, patents should issue conveying the right and title to said lands to said company on each side of the road as far as the same should be completed to the amount aforesaid, and that patents should issue as each forty miles of said railroad and telegraph line should be completed upon certificate of said commissioners; and said section four of said act further provided that no such commissioners should be appointed by the President of the United States unless there should be presented to him a statement, verified by an oath by the president of said company, that such forty miles have been completed in the manner required by said act, and setting forth with certainty the points where such forty miles begin and where the same end, which oath shall be taken before a judge of a court of record.

13. And your orator further shows that said section four of said act was amended by section six of the act of Congress approved on July 2d, A. D. 1864, whereby the President of the United States was authorized at any time after the passage of said last-mentioned act to appoint three commissioners for the said road; and that the verified statement of the president of the "Central Pacific Railroad Company of California" should be filed in the office of the

Act of '64 reduces sections to twenty miles, etc.

United States surveyor general for the State of California instead of being presented to the President of the United States; and that the surveyor general should thereupon notify said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed and make their report thereon to the President of the United States; and that such statement might be filed and said railroad and telegraph line be examined and reported on by the said commissioners and the lands appertaining thereto be set apart, located, entered, and patented as provided in the said last-mentioned act and the act of July 1st, A. D. 1862, of which said act of July 2d, A. D. 1864, is amendatory, upon the construction by the said "The Central Pacific Railroad Company of California" or its assignee, "the Western Pacific Railroad Company," or its successor, the Central Pacific Railroad Company, of any portion, not less than twenty consecutive miles in length, of their said railroad and telegraph line upon the certificate of said commissioners that such portion had been completed as required by the act of July 1st, A. D. 1862, as aforesaid.

The W. P. R. R. Co. did build the road & telegraph line.

14. And your orator further shows
12 that in consequence of said acts of Congress hereinafter mentioned "the Western Pacific Railroad Company" did build a railroad and telegraph line from the city of Sacramento to the city of San Jose, through the city of Stockton, to the point on the San Francisco and San Jose railroad at the city of San Jose, where it did connect with the said San Francisco and San Jose railroad, and at the city of Sacramento did connect with the line and track of "the Central Pacific Railroad Company of California," in conformity with said assignment and the acts of Congress herein mentioned and pertaining thereto; that said railroad and telegraph line was built and completed in all respects as contemplated by said acts of Congress and was ready for said service contemplated and expressed by said act of Congress and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, and that the rails and all other irons used in the construction and equipment of said road and telegraph line *was* of American manufacture of the best quality, on or before the 29th day of December, 1869, and more than fifty miles thereof *was* completed in each year after the passage of the act of May 22d, A. D. 1866; that after the passage of the said acts of Congress of July 2d, A. D. 1864, and of July 3d, 1866, the President of the United States of America did appoint three commissioners for each road—that is
13 to say, three commissioners for "the Western Pacific Railroad Company" and three commissioners for "the Central Pacific Railroad Company of California;" that the president of "the Western Pacific Railroad Company" filed in the office of the surveyor general for the State of California, on the 29th day of Septemoer, A. D. 1866, a statement, verified by his oath before the judge of the dis-

trict court of the twelfth judicial district of the State of California in and for the city and county of San Francisco, which said court was a court of record, that twenty consecutive miles of said railroad and telegraph line, mentioned and provided for in said acts of Congress aforesaid, *was* built, completed, and equipped and ready for the service mentioned in and contemplated by said acts of Congress, and stating that the said twenty miles of constructed and completed road commenced at the terminus of the San Francisco and San Jose railroad, and connected therewith at the corner of Dame and San Pedro streets, in the city of San Jose, county of Santa Clara, and ended at a point near the eastern boundary of Alameda canyon, in Alameda county, California, and stating that the twenty consecutive miles of said railroad and telegraph line *was* supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, and that the rails and all the
14 other iron used in the construction and equipment of said twenty miles of said railroad and telegraph line *was* of American manufacture of the best quality, and that the track of said railroad was of the uniform width and gauge of four feet eight and one-half inches, and that "the Western Pacific Railroad Company" requested the said surveyor general, upon filing the statement in his office, to notify the commissioners appointed by the President of the United States to examine and report and certify upon the said section of twenty miles, as required by said acts of Congress; that afterwards the said surveyor general for the State of California did notify the said commissioners for said road of the filing of such statement, and the said commissioners did thereupon proceed to examine the portion of said railroad and telegraph line so completed and did make their report thereon to the President of the United States, as provided by the acts of Congress, and did in said report certify that twenty miles of said railroad and telegraph line had been built and completed as required by said acts of Congress, and it appeared to the President of the United States that twenty consecutive miles of said railroad and telegraph line had been built & completed as required by said acts of Congress, and the President of the United States was fully satisfied of that fact, and the said commissioners delivered to the President of the United States a certificate in writing to the effect aforesaid.

15. And your orator further shows that afterwards, to wit, on the 28th day of April, A. D. 1869, the president of the Western Pacific Railroad Company filed in the office of the surveyor general for the State of California another statement in writing, and verified on his oath before S. W. Sanderson, one of the justices of the su-
15 preme court of the State of California, which court was and is a court of record, setting forth that twenty consecutive miles of the said Western Pacific Railroad Company's railroad and telegraph line, mentioned and provided for in said acts of Congress, in addition to the twenty consecutive miles hereinbefore mentioned and described as having been built and completed, had also been built, completed, and equipped and ready for the service contem-

plated by said acts of Congress, and stating that the said twenty consecutive additional miles of said railroad and telegraph line began near the American River bridge, on the line of the Central Pacific Railroad Company's railroad, and terminated at the end of the twentieth mile therefrom in a southerly direction, on the line of said "The Western Pacific Railroad Company's" road, and that the said twenty additional miles of railroad *was* supplied with all the necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, rolling stock, cars, locomotives, and all the appurtenances of a first-class railroad, and the rails and all other iron used in the construction and equipments of the said additional twenty miles of said railroad and telegraph line were of American manufacture of the best quality; that the track of the said railroad was of the uniform width and gauge of four feet eight and one-half inches, and the grades and curves of the same did not exceed the maximum grades and curves of the Baltimore and Ohio railroad; that the maximum curves did not exceed four degrees (4°) or a radius of 1,433 feet, and the
16 maximum grades did not exceed thirty-one feet per mile, and said statement further set forth that the Western Pacific Railroad Company requested the surveyor general, upon filing said statement in his office, to notify the commissioners appointed by the President of the United States to examine and report and certify upon said additional consecutive twenty miles of said railroad and telegraph line, as required by said acts of Congress.

Commissioners report completion of twenty additional miles of road.

16. That afterward said surveyor general for the State of California did notify the said commissioners for said "The Western Pacific Railroad Company" of the filing of such statement, and the said commissioners did thereupon proceed to examine the portion of said railroad and telegraph line mentioned in said last statement as having been built and completed, and did make *there* report thereon to the President of the United States, as provided by the said acts of Congress, and did in said report certify that said twenty consecutive miles of railroad and telegraph line last above described had been built and completed as required by said acts of Congress, and it appeared to the President of the United States that said twenty consecutive miles of railroad and telegraph line had been built and completed as required by said acts of Congress, and the President of the United States was fully satisfied of that fact, and the said commissioners delivered to the President of the United States a certificate in writing to the effect aforesaid.

17. And your orator further shows that afterwards, on the 12th day of October, A. D. 1869, the presi-

Third statement filed. 17 dend of "the Western Pacific Railroad Company" filed in the office of the surveyor general for the State of California another statement in writing and verified by his oath taken

before S. W. Sanderson, one of the justices of the supreme court of the State of California, which said court was and is a court of record, setting forth that the said "The Western Pacific Railroad Company" had completed and fully equipped, ready for the service contemplated by said acts of Congress, and then had in running order and was then operating sixty-three (63) consecutive miles of its railroad and telegraph line mentioned and provided for in and by said acts of Congress in addition to and in continuation of the twenty (20) miles of the railroad and telegraph line mentioned and described in the statement made by said "The Western Pacific Railroad Company," dated the 28th day of April, A. D. 1869, as hereinbefore set forth; that said addition and continuation of said railroad and telegraph line began at the termination of the twentieth mile from the point of junction of said road with the road of "the Central Pacific Railroad Company of California," near the American River bridge, and terminated at the end of the eighty-third (83d) mile from said point of junction; that the said addition and continuation was supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, rolling stock, cars, locomotives, and all the appurtenances of a first-class railroad, and the rails and all
18 other iron used in the construction and equipment of the said addition and continuation of said railroad and telegraph line were of American manufacture of the best quality; that the track of the same was of the uniform width and gauge of four feet eight and one-half inches, and the grades and curves of the same did not exceed the maximum grades and curves of the Baltimore and Ohio railroad; that the maximum curves did not exceed eight degrees (8°) or a radius of seven hundred and seventeen feet, and the maximum grades did not exceed fifty-two and eight-tenths ($52\frac{8}{10}$) feet per mile, and the said statement further set forth that "the Western Pacific Railroad Company" requested the said surveyor general, upon filing said statement in his office, to notify the commissioners appointed by the President of the United States under and in pursuance of the provisions of said acts of Congress to examine and report upon said railroad and telegraph line and to inform them of the filing of this statement, that they may proceed, examine, and report upon the said addition and continuation of the said railroad and telegraph line; and your orator further shows that afterwards the surveyor general of the State of California did notify the said commissioners for said "The Western Pacific Railroad Company" of the filing of such statement, and the said commissioners did thereupon proceed to examine the portion of said railroad and telegraph line so completed and mentioned in said statement last aforesaid, and did make their report thereon to the President of the United States, as provided by said acts of Congress, and it appeared
19 to the President of the United States that the said sixty-three consecutive additional miles of said railroad and telegraph line were completed and equipped in all respects as required by

Commissioners' report of completion of sixty-three additional miles of road—in all eighty-three miles.

said acts of Congress, and the President of the United States was fully satisfied of the fact, and the said commissioners delivered to the President of the United States a certificate to the effect that said sixty-three miles of said railroad and telegraph line were completed as required by the said acts of Congress.

Fourth statement filed.

18. And your orator fu-ther shows that afterwards, to wit, on the 29th day of December, A. D. 1869, the president of "the Western Pacific Railroad Company" filed in the office of the surveyor general for the State of California another statement in writing and verified by his oath taken before S. W. Sanderson, one of the justices of the supreme court of the State of California, which said court was and is a court of record, setting forth that the said "The Western Pacific Railroad Company" had completed and fully equipped ready for the service contemplated by the said acts of Congress and had then in running order and was operating twenty and two-tenths ($20\frac{2}{10}$) consecutive miles of its railroad and telegraph line mentioned and provided for in and by said acts of Congress in addition to and in continuation of the eighty-three (83) miles mentioned and described in the statements theretofore made by said company, dated April 28, 1869, and October 12, 1869, as hereinbefore set forth; that the said addition and continuation of said railroad and telegraph line began at the termination of the eighty-third mile from the point of
20 junction of said road with the road of "the Central Pacific Railroad Company of California," near the American River bridge, and terminated *and* the end of the one hundred and third mile from said point of junction; that the said addition and continuation was supplied with all the necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, rolling stock, cars, locomotives, and all the appurtenances of a first-class railroad, and that the rails and all other iron used in the construction and equipments of the said addition and continuation of said railroad and telegraph line were of American manufacture of the best quality; that the track of the same was of the uniform width and gauge of four feet eight and one-half inches, and the grades and curves of the same did not exceed the maximum grades and curves of the Baltimore and Ohio railroad, and that the maximum curves did not exceed eight degrees (8°) or a radius of seven hundred and seventeen feet, and that the maximum grades did not exceed fifty-two and eight-tenths ($52\frac{8}{10}$) feet per mile, and said statement further set forth that "the Western Pacific Railroad Company" requested the said surveyor general, upon filing said statement in his office, to notify the commissioners appointed by the President of the United States under and in pursuance of the provisions of the said acts of Congress to examine and report upon said railroad and telegraph line and to inform them o the filing of said statement so that they may proceed to e mine and

report upon the said last-mentioned addition and continuation of the railroad and telegraph line of said "The Western Pacific Railroad Company."

21 Commissioners' report of the completion of the 20 & $\frac{2}{10}$ additional miles of road—in all one hundred & three & $\frac{2}{10}$ miles.

19. And the said commissioners did thereupon proceed to examine the portion of said railroad and telegraph line so completed, and did make their report thereon to the President of the United States, as provided by said acts of Congress, and it appeared to the President of the United States by said report that the said twenty and two-tenths consecutive miles of said railroad and telegraph line were completed and equipped in all respects as required by said acts of Congress, and the President of the United States *was* fully satisfied of the fact, and the said commissioners delivered to the President of the United States a certificate to the effect that the said twenty and two-tenths miles of said railroad and telegraph line was completed and equipped in all respects as required by the acts of Congress relating thereto.

Patents ordered to be issued.

20. And your orator further shows that the President of the United States, upon such report and certificate of the commissioners above set forth, ordered that the said several sections of said railroad and telegraph line be accepted, and that the bonds and patents for land due on account of the completion of said sections, agreeably to the provisions of said acts of Congress, be issued to the said "The Western Pacific Railroad Company."

The lands described in the bill a portion of the land granted.

21. And your orator further shows that the lands herein mentioned and described are a portion of the lands to which the said "The Western Pacific Railroad Company" were entitled to have and receive patents from the United States of America by reason of said acts of Congress and the building and completion of said railroad and telegraph line in accordance with the terms and conditions of said acts and the acceptance thereof by the
22 President of the United States.

R. R. Co. performed all the conditions required.

22. That said "The Union Pacific Railroad Company," said "The Central Pacific Railroad Company of California," said "The Western Pacific Railroad Company," and said "Central Pacific Railroad Company" did do and perform all and singular the acts and conditions required to be kept, done, and performed by them by the terms of said act of Congress of July 1st, A. D. 1862, and the acts of Congress subsequently passed supplementary thereto and amendatory thereof, to entitle them to have and receive patents of the

United States of America conveying to them every alternate section of public land designated by odd numbers in the public-land surveys of the United States to the amount of five alternate sections per mile on each side of said railroads on the line thereof and within the limits of ten miles on each side of said roads.

Date of completion of W. P. R. R. Co. Dec. 29th, 1869.

23. That said "The Western Pacific Railroad Company's" railroad and telegraph line was built and completed from its point of junction with "the Central Pacific Railroad Company of California's" road at city of Sacramento to a point between the city of Sacramento and the city of San Jose, distant southerly one hundred and three and two-tenths ($103\frac{2}{10}$) miles from the city of Sacramento, on or before the twenty-ninth (29th) day of December, A. D. 1869; that on or after said twenty-ninth day of December, A. D. 1869, said "The Western Pacific Railroad Company" was lawfully entitled to have and receive patents of the United States of America, conveying to said company the following-described lands, the same being within the limits of ten miles on each side of said company's
23 railroad, so as above completed, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached, the same being designated in the land surveys of the United States as follows, to wit: Section thirteen (13), the north half and southwest qua-ter of section fifteen (15), the east half of section twenty-one (21), the northeast qua-ter of section thirty-three (33), section thirty-five (35), all in township two (2) south, range one (1) east, of the Mount Diablo base and merid-an; also lot fourteen (14), the southeast qua-ter of the southwest qua-ter, the southwest qua-ter of the southeast qua-ter, of section seventeen (17); the southeast qua-ter of the northeast qua-ter, the northeast qua-ter of the northeast qua-ter, lot four, the southwest qua-ter of the northeast qua-ter, lot five, the fractional southeast qua-ter of the northwest qua-ter (lot 1), lot seven (7), of section nineteen (19), and west half of section twenty-one (21), all of township three (3) south, range three (3) east, of the Mount Diablo base and merid-an, containing in total twenty-eight hundred sixty-seven and $\frac{10}{100}$ acres, and situate in the counties of Alameda and Contra Costa and State of California, and of the value of more than $10,000.

Wrongful listing to the State of Cal.

24. That the Commissioner of the General Land Office did, at the various and respective dates hereinafter stated, without right and through error, inadvertence, and mistake, wrongfully list, by certified lists thereof, to the State of California the said above-described lands, to wit, on the eighth (8th) day of September, A. D. 1870, the east half of section thirteen (13), the northeast qua-ter (N. E. $\frac{1}{4}$) of section fifteen (15), the northeast qua-ter (N. E. $\frac{1}{4}$) of section
24 thirty-three (33), section thirty-five (35), the east half (E. $\frac{1}{2}$) of section twenty-one (21), in township two (2) south, range one (1) east, of the Mount Diablo base and merid-an; on the eleventh

(11th) day of March, A. D. 1871, the west half (W. ½) of section thirteen (13) and the west half (W. ½) of section fifteen (15), in township two (2) south, range (1) east, of the Mount Diablo base and merid-an; on the fifteenth (15th) day of November, A. D. 1871, the lot 14, the southeast qua-ter of the southwest qua-ter (S. E. ¼ of S. W. ¼), the southwest qua-ter of the southeast qua-ter (S. W. ¼ of S. E. ¼), section seventeen (17); the southeast qua-ter of the northeast qua-ter (S. E. ¼ of N. E. ¼) of section nineteen (19), the west half (W. ½) of section twenty-one (21), all in township three south, range three east, of the Mount Diablo base and merid-an; and on the twenty-fourth day of March, A. D. 1873, the northeast qua-ter of the northeast qua-ter (N. E. ¼ of N. E. ¼), lot four (4), the southwest qua-ter of the northeast qua-ter (S. W. ¼ of N. E. ¼), lot five (5), lot one (1), and lot seven (7), of section nineteen (19), in township three (3) south, range three (3) east, of Mount Diablo base and merid-an, all, as they appear in the records of the public-land surveys of the United States of America, in and for the State of California, containing and amounting to the number of twenty-eight hundred sixty-seven $\frac{10}{100}$ (2,867.10) acres.

25. That on the 12th day of May, A. D. 1874, the Central Pacific Railroad Company, successor to "the Western Pacific Railroad Company," as hereinbefore set forth, by its deputy land agent, Charles J. Torbet, presented to the register and receiver of the United States land office, at San Francisco, California, his No. 13 of selections of public lands, claimed by said Central Pacific Railroad Company, successors to "the Western Pacific Railroad Company," as inuring to it under and by virtue of the grants and provisions of said acts of Congress hereinbefore mentioned and by virtue of the location, construction, and completion of said line of railroad known as "the Western Pacific Railroad Company's" line of railroad, to which lands it was legally entitled to have and receive lands patents, which said list of selections of land included the lands hereinbefore set forth, and requested said register and receiver to certify that they had carefully and critically examined said list of land claimed by the Central Pacific Railroad Company, successor as aforesaid, under the grant to "the Central Pacific Railroad Company of California" by acts of Congress approved on July 1st, 1862, and July 2d, 1864, presented by said Charles J. Torbet, the duly authorized agent of the Central Pacific Railroad Company, and that they had tested the accuracy of said list by the plats and records of their office, and that they found the same to be correct, and that the whole of said lands were surveyed public lands of the United States and within the limit of ten miles on each side of said "The Western Pacific Railroad Company's road," and that the same was not nor was any part thereof returned and denominated as mineral land or lands, nor was there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in said office, and that the filing of said list is allowed and approved, and that they further certify that said list shows

Torbett's list No. 13 rejected by register & receiver.

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an assessment of fees payable to them, the said register and receiver, and that said fees had been paid in full to said register and receiver by said Central Pacific Railroad Company, and which fees in fact had been so paid in full; that said mistake, error, and inadvertence of the said Commissioner of the General Land Office in listing by certified lists said land to the State of California was not discovered by complainants or its officers of the said land department or by said Central Pacific Railroad Company or its grantees until the 12th day of May, 1874, nor could the same by reasonable diligence have been discovered sooner; that thereupon said register and receiver wrongfully and in violation of their duty refused to certify said list as aforesaid requested and refused to certify the same in any manner whatsoever.

26. That the State of California did, at various times subsequent to said eighth (8th) day of September, A. D. 1870, by it- lands patent, purport to convey said lands mentioned in said list to divers and sundry persons other that "the Western Pacific Railroad Company" or its successors, the Central Pacific Railroad Company, and against the will and without the consent of the said companies or either of them, as follows, to wit, on the 9th day of November, A. D. 1870, the northeast qua-ter of section fifteen (N. E. ¼ of sec. 15), township two (2) south, range one east, of Mount Diablo base and merid-an (T. 2 S., R. 1 E., of M. D. B. M.), to one M. L. English, and on the same day last mentioned the northeast qua-ter of section thirty-three, in township two south, range one east, of Mount Diablo
27 base and meridian (N. E. ¼ of sec. 33, T. 2 S., R. 1 E., of M. D. B. M.), to one A. J. Shrader; on 3d day of February, A. D. 1871, the east half of section thirteen, in township two south, range one east, of Mount Diablo base and merid-an (E. ½ sec. 13, in T. 2 S., R. 1 E., M. D. B. and M.), to one S. B. Martin; on the 6th day of April, A. D. 1871, the west half of section thirteen, in township two south, range one east, of Mount Diablo base and merid-an (W. ½ of sec. 13, T. 2 S., R. 1 E., M. D. B. and M.), to one Samuel Davis, Jr.; on the third day of February, A. D. 1871, the east half of section twenty-one, township two south, range one east, of the Mount Diablo base and merid-an (E. ½ of sec. 21, T. 2 S., R. 1 E., M. D. B. & M.), to one Thomas Murphy; on the 5th day of April, A. D. 1873, the northeast qua-ter of the northeast qua-ter, the southwest qua-ter of the northeast qua-ter, and lots 1, 4, 5, and 7 of section nineteen (19), township three south, range three east, of the Mount Diablo base and merid-an, to one Loyd Tevis; on the twenty-ninth (29th) day of November, A. D. 1871, the south half of the southwest qua-ter, the southwest qua-ter of the southeast qua-ter, of section seventeen (S. ½ of S. W. ¼, S. W. ¼ of S. E. ¼, sec. 17); the southeast qua-ter of the *of the* northeast qua-ter of section nineteen (S. E. ¼ of N. E. ¼, sec. 19), the northwest qua-ter and the southwest qua-ter of section twenty-one (N. W. ¼ and S. W. ¼ of sec. 21), in township three south, range three east, of the Mount Diablo base and merid-an, to W. S. Chapman, T. W. Moore, H. F. Crane, and W. W. Johnson; on the eighteenth day of May, A. D. 1872, the north half of section thirty-five (N. ½ sec. 35), in township two south, range one east, of the

Mount Diablo base and merid-an (T. 2 S., R. 1 E., M. D. B.
28 and M.), to one C. F. Goodrich; and on the same day, the said eighteenth days of May, 1872, the south half of said section thirty-five to one F. O. Wakeman; and on the fourth day of March, A. D. 1878, the west half of section fifteen, in township two south, range one east, of Mount Diablo base and merid-an (W. ½ of sec. 15, T. 2 S., R. 1 E., M. D. B. and M.), to one S. B. Martin; said lands above mentioned and set forth being the same as so set forth in the public-land surveys of the United States of America, in the State of California, and in the records thereof; that said English, Schroder, Martin, Davis, Murphy, Tevis, Chapman, Moore, Johnson, Goodrich, and Wakeman, subsequent to the issuance of said patents by the State of California to them respectively and prior to the commencement of this action, did by valid mesne conveyances, duly executed and acknowledged, convey all their right, title, and interest in and to said land to the defendants herein.

Said lands not sold or reserved, etc.

27. And your orator further shows that on the first day of July, A. D. 1862, and on the thirtieth day of November, A. D. 1862, and on the second day of July, A. D. 1864, and on the fifth day of October, A. D. 1864, and on the thirtieth day of January, A. D. 1865, and on the twenty-ninth day of December, A. D. 1869, said lands herein described and set forth were alternate sections of the public lands of the United States, designated by odd numbers, within ten miles of said "The Western Pacific Railroad Company's" road and on the line thereof, and were not sold or reserved or otherwise disposed of by the United States and no pre-emption or homestead claim attached to the same at the time the line of the road was definitely
fixed, and were not mineral lands within the meaning of
29 said acts of Congress and were not excepted out of said grant of land by said acts of Congress; that at the respective dates above mentioned there was no pre-emption or homestead claim to said —, nor was the same swamp or overflowed land, nor was there any lawful claim to the same other than that of said railroad companies, nor was there any Government reservation of the same; that "the Western Pacific Railroad Company" paid to said commissioners the fees as fixed by law for examining the aforesaid completed sections of said company's railroad and telegraph line, and paid into the Treasury of the United States the cost of surveying, selecting, and conveying said lands.

Patent issued for part of lands and refused as to part.

28. And your orator further shows that the President of the United States did cause patents to be issued for a part of the lands to which the Western Pacific Railroad Company and its successor, the Central Pacific Railroad Company, were entitled, as hereinbefore shown and set forth, but said President refused to issue or cause to be issued to the Western Pacific Railroad Company or its successor, the Central Pacific Railroad Company, a patent for said land herein described,

or for any part thereof; that he so refused, not because the said The Western Pacific Railroad Company and its successor had not complied with the said acts of Congress, nor because it was not the kind and description of land granted, but solely because said land had previously been by mistake wrongfully and inadvertently listed to the State of California as hereinbefore set forth.

And your orator further shows that said defendants
30 and their grantors at all the times mentioned in this bill had actual notice of the said grant of said lands to said company, the said withdrawal thereof, the said erroneous and unlawful listing thereof by the said error, inadvertence, and mistake of the said commissioner, and of each and all of the matters and things hereinbefore set forth.

29. And your orator further shows that immediately after the refusal of the register and receiver of the land office at San Francisco to sign and certify said list presented by said Torbet, known as list No. 13, and to receive the fees therefor duly tendered, as is hereinbefore set forth, to wit, on the 20th day of May, A. D. 1874, Tully R. Wise, Esq., attorney for the Central Pacific Railroad Company, filed with the said register and receiver a written request for a certified copy of the records of their office relating to the lands embraced in said list No. 13, which they refused to sign on account of the existence of certain State claims thereto. On the 30th day of said month of May said Tully R. Wise, as attorney of the Central Pacific Railroad Company, filed an appeal to the Commissioner of the General Land Office of the United States, accompanied by a printed brief from the action of said register and receiver in rejecting and refusing to sign and certify said list No. 13; that on the 3d day of June next following the register of the United States land office at San Francisco forwarded the said rejected list No. 13 and said appeal, together with said brief, *the* the United States Land Office at Washington; that on the 25th*e* day of July, 1874, Joseph Tyssowski filed his appearance in said matter before the Commissioner
31 for and in behalf of said railroad company, and afterwards in due time filed his brief in said matter; and thereupon the said appeal was taken under advisement; that on the 25th day of February, A. D. 1878, said Tyssowski called the Commissioner's attention to the decision of the Secretary of the Interior of January 15th, 1878, in the case of State of California *vs.* M. D. Townsend *et al.*, directing the Commissioner to call on the State of California for relinquishment of all said lands so awarded to the Western Pacific Railroad Company, and requested thereunder action on said railroad list No. 13, "with the view of patenting said lands to the said Western Pacific Railroad Company as soon as possible;" that thereafter, on the 9th day of March, 1878, the Commissioner of the General Land Office made his decision and awarded the land mentioned and described in this bill to the Central Pacific Railroad Company, successor and assignee of the Western Pacific Railroad Company; that thereafter, on the 25th day of May, 1878, said Wm. D. English filed an appeal for review of said decision of March 9th, 1878, on behalf of himself and other defendants herein; that thereafter, on the 29th

day of March, 1878, the register of the United States land office at San Francisco forwarded the appeal of the State of California filed by said English for review of the Commissioner's decision to the General Land Office, at Washington, and that thereafter the Commissioner of the General Land Office denied the application for review; that thereafter, on the 13th day of December, 1878,
32 said English, attorney, filed with the register of the land office at San Francisco a request, addressed to the Commissioner of the General Land Office, asking that the papers in the case be sent to the Secretary of the Interior, and that on the day following, to wit, on December 14th, 1878, the said register forwarded the papers as requested to the Commissioner, and on the 30th of the same month the Commissioner forwarded said papers to the said Secretary; that on the 18th day of March, 1879, the register and receiver of the land office at San Francisco reported that in accordance with the instructions of January 24th, 1878, they, on February 25th, 1878, had made demand on the State of California for the surrender of the certification by the commissioner of the State of California of the lands hereinbefore described, and that no surrender had been made, and on the same day, viz., March 18th, 1879, the said register and receiver reported that in accordance with the Commissioner's instructions of March 9th, 1878, they, on March 26th, 1878, furnished the State surveyor general a copy of said letter of instructions and made demand on the State of California to surrender her title and listing of said lands, but that up to that date (March 18th, 1879) she had failed to surrender as requested; that on the 2d day of April, 1879, the reports above mentioned were submitted to the Secretary of the Interior; that thereafter, on the 26th day of June, 1879, the Secretary of the Interior affirmed the Commissioner's decision of March 9th, 1878,
33 awarding said land to said company, but refusing to issue patents, for the reason that said land had been wrongfully listed to the State of California; that thereafter, on the 8th day of December, 1879, the Secretary of the Interior transmitted to the Commissioner a letter from the attorney general of the State of California, dated April 1st, 1878, refusing to relinquish and surrender the certification and listing of said lands theretofore listed and certified to the State of California by the said Commissioner; that afterwards, to wit, on the 22d day of April, 1880, Britton and Gray and said Tyssowski, attorneys at Washington, D. C., on behalf of the Central Pacific Railroad Company, filed in the General Land Office, at Washington, the petition of Irving and Le Briton, attorneys at San Francisco, also attorneys for said company, for a reconsideration of so much of the Secretary's decision of June 26, 1879, as declined to issue to the said railroad company patents for the lands therein declared and decided to belong to said railroad company, but which had been previously, by mistake, wrongfully certified and listed to the State of California, and they, viz., Britton and Gray and said Tyssowski, also, on the same day, filed their respective briefs in the matter; that afterwards, on the 29th day of April, 1880, the papers in the case were sent by the Commissioner to the Secretary of the Interior, with his report thereon; that afterwards, on the 12th

day of July, 1881, the Secretary of the Interior requested the opinion of the Attorney General of the United States whether
34 patents could then be issued for said land or the certification to the State of California must first be judici-lly vacated; that afterwards, on the 18th day of October, 1882, the Secretary of the Interior addressed the Commissioner of the General Land Office, enclosing copy of the Attorney General's opinion, and directed the papers to be prepared for suit to set aside and annul the listing and certification of said lands to the State of California; that thereafter, on the 2d day of December, 1882, the papers and documents necessary and proper for the commencement of the suit were sent *to* the Commissioner of the General Land Office from the archives thereof to the Secretary of the Interior; that afterwards, on the 6th day of December, 1882, the Secretary of the Interior requested the Attorney General of the United States to commence suit in the proper court to set aside the listing to the State of California of the lands hereinbefore described and set forth.

Demand on State of California for relinquishment.

30. Your orator further shows that on the 25th day of February, A. D. 1878, as stated aforesaid, demand was made upon the State of California by the United States of America that the State of California relinquish to the United States of America its title to said lands, and that said demand was refused and has not been complied with at the date of the commencement of this action, to the damage and injury of the United States, who are bound in equity and good faith to hold harmless the said Central Pacific Rail-
35 road Company, their grantees and assigns, from the consequences of the errors and mistakes of their own and their officers, and particularly those resulting from the said error, mistake, and inadvertence of the said Commissioner of the General Land Office in listing over to the State of California the lands described aforesaid.

Dil*l*igence in land department.

31. Your orator further shows that the proceedings aforesaid have been continuously pending before the land department of the United States of America for the purpose of correcting said error and mistake alleged aforesaid, and the same have been under advisement and consideration by the officers of said department, and have been advanced and prosecuted with due diligence and in accordance with the practices and usages of sai d department relating to such matters.

32. And your orator further shows that prior to the said 6th day of December, A. D. 1882, it has been the uniform practice and usage of said department to issue second patents to claimants of land whenever it was made to appear to said department that the first patent for any cause had been wrongfully issued.

33. In support of the matters hereinbefore set forth and alleged your orator begs leave to refer to the proceedings had before the

land office of the United States of America for the district of San Francisco, in the State of California, and before the General Land Office, at Washington, and before the surveyor general's office at San Francisco, and to the documents on file therein relating to or in anywise affecting said lands above described, claimed herein
36 to have been granted to the Central Pacific Railroad Company of California by said act of Congress of July 1st, A. D. 1862, and subsequently by mistake wrongfully listed to the State of California.

34. Your orator further shows that the said defendants and each of them respectively claim to have some right, title, or interest in and to said lands described aforesaid, derived or claimed to have been derived from or through the State of California and not otherwise, and under, through, and by virtue of such right and title as the State of California obtained by virtue of the listing to the State in manner and form as stated aforesaid and not otherwise; that the true names of the defendants sued herein as John Doe, James Doe, George Doe, William Doe, Joseph Doe, Richard Roe, Thomas Roe, Charles Roe, Frank Roe, and Daniel Roe are to your orator unknown, and he therefore prays that when the true and real name of any one said defendants shall be ascertained this complaint may be amended, and such true and real name may be inserted herein as a defendant in this action.

Wherefore your orator prays relief and decree of this court that the said listings of said lands to the State of California as aforesaid be set aside, recalled, cancelled, and annulled, and that all the defendants herein be forever estopped and forbidden from asserting any right or title to said lands, and that the same in said de-
37 cree declared to be public lands of the United States of America, subject to said rights of the Central Pacific Railroad Company, its grantees and assigns, as hereinbefore set forth, and that the plaintiff have such other and further relief in the premises as may seem to the court to accord with the principles of equity.

May it please the court to grant to The United States of America, the plaintiff herein, the writ of subpœna issuing out of and under the seal of this honorable court, directed to the defendants, Henry Curtner, Samuel Davis, Samuel B. Martin, J. West Martin, W. D. English, John R. Deardorff, Terissa G. Taylor, Alfred E. Whitaker, George M. Taylor, F. S. Wexsinger, John O'Hara, Rasmus Bjorn, Henry F. Crane, Thomas Newell, Le Grand Morehouse, Andrew S. Barron, James Barron, Bank of California, Franz Leberer, Patrick Armstrong, Margaret Armstrong, his wife; Garrison Gerst, Charles G. Johnston, Sr., Martin Durand, Anthony Thompson, Rasmus H. Carstensen, Francis Schiveer, John Hinkle, Thomas W. Moore, Joseph Doe, Richard Roe, Thomas Roe, Charles Roe, Frank Roe, and Daniel Roe, commanding them and each of them, on a day certain to be named therein, to be and appear in this honorable court to answer

all and singular the premises and to stand to and abide by and perform such other directions and decrees as may be made herein.

38 BENJAMIN HARRIS BREWSTER,
Attorney General of the United States of America,
on Behalf of the United States of America, Solicitor.

S. G. HILBORN,
United States Attorney, of Counsel.
SHAFTER, PARKER AND WATERMAN,
Of Counsel for Compl'nt.

(Endorsed:) Service of a copy of the within amended bill admitted this 19th day of December, 1884. Rothchild and Baum, att'ys for Gerst and other def'ts. Latimer and Morrow, att'y- for def'ts. H. F. Crane, solicitor for def'ts. Filed Dec'r 23d, 1884. L. S. B. Sawyer, clerk.

39 *Demurrer to Amended Bill.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER, SAMUEL DAVIS, SAMUEL B. MARTIN, J. WEST Martin, W. D. English, John R. Deardorff, Terrissa G. Taylor, Alfred E. Whitaker, George M. Taylor, F. S. Wensinger, John O'Hara, Rasmus Bjorn, Henry T. Crane, Statiria A. Newell, as the Executrix of the Last Will and Testament of Thomas Newell, Deceased; Le Grand Morehouse, Andrew S. Barron, James Barron, The Bank of California, a Corporation; Franz Leberer, Patrick Armstrong, Margaret Armstrong, His Wife; Garrison Gerst, Charles G. Johnston, Rasmus H. Carstenson, Franziska Schweer, John Hinkle, Thomas W. Moore, Joseph Doe, Richard Roe, Thomas Roe, Chas. Ros, Frank Roe, and Daniel Roe, Defendants.

The defendants above named, by protestation, not confessing all or any of the matters and things in said complainant's amended bill contained to be true in such manner and form as the same are herein set forth and alleged, do demur to said amended bill and for causes of demurrer show—

1. That said complainant hath not in and by its said
40 amended bill made or stated such a case as doth or ought to entitle it in a court of equity to any such relief as is thereby sought and prayed for or to any relief as against these defendants or any of them as to the matters contained in said bill or any of such matters.

A. That the complainant ought not to have or maintain this action against the defendants, because it appears upon the face of the amended bill that said action is prosecuted solely and only on behalf and in the interest of the Central Pacific Railroad Company (a

private corporation) or its grantees, who are not named in the amended bill, and that no action or cause of action has accrued to said Central Pacific railroad or it- grantees by reason of the matters set forth in said amended bill at any time within five years preceding the commencement of this action or the filing of the original bill herein.

B. That it appears by said amended bill that the United States of America is not the real party in interest as complainant herein, but that this action is prosecuted solely in behalf of and in the interest of certain supposed private persons not named in the amended bill, and that this action and any action on their behalf in relation to the matters set forth in said amended bill is barred by the provisions of sections 318 and 319 of the Code of Civil Procedure of the State of California.

C. That the complainant ought not in equity and good conscience to have the relief herein prayed for or any relief, because it appears upon the face of the amended bill that said pretended cause
41 of action arose, if ever, in or about the years 1870 and 1871, and this action was not commenced until June 23d, 1883, nearly thirteen years afterwards, and no excuse is shown on the part of the complainant for such great delay in the commencement of this suit, and that such claim is now stale.

D. The court cannot determine or decide, upon the facts stated in the amended bill, that said lands therein mentioned or any part of it was, in 1870 or 1871 or at any time, without right or through error, inadvertence, or mistake, or in any manner, wrongfully certified over to the State of California.

Wherefore these defendants, Henry Curtner, Samuel Davis, Samuel B. Martin, J. West Martin, W. D. English, John R. Deardorff, Terrissa G. Taylor, Alfred E. Whitaker, Geo. M. Taylor, F. S. Wensinger, John O'Hara, Rasmus Bjorn, Henry F. Crane, Statiria A. Newell, as executrix of the last will and testament of Thomas Newell, deceased; Le Grand Morehouse, Andrew S. Barron, James Barron, The Bank of California (a corporation), Franz Leberer, Patrick Armstrong and Margaret, his wife; Garrison Gerst, Charles G. Johnston, Rasmus H. Carsterson, Franziska Schweer, John Hinkle, and Thomas W. Moore, pray the judgment of this honorable court whether they or any of them shall be compelled to make any further or other answer to the said amended bill or any of the matters and thinks therein contained, and ask to be dismissed with their reasonable costs in this behalf sustained.

H. F. CRANE AND
LATIMER AND MORROW,
42 *Solicitors for the Defendants.*

L. D. LATIMER, *Counsel.*

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

L. D. LATIMER,
Counsel for said Defendants.

UNITED STATES OF AMERICA, } ss:
District of California, County of Alameda, }

J. West Martin, one of the defendants aforesaid, being duly sworn, deposes and says that the foregoing demurrer is not interposed for delay.

J. WEST MARTIN.

Subscribed and sworn to before me this 6th day of January, A. D. 1885.

——— ———.

(Endorsed:) Filed January 6th, 1885. L. S. B. Sawyer, clerk.

43 *Amendment to Amended Bill.*

In the Circuit Court of the Ninth Circuit of the United States of America for the District of California.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et als.*, Defendants.

Amendment to amended complaint.

By leave of court first had and obtained, the plaintiff further amends the complaint filed herein by striking out lines 13 to 19, inclusive, on page 4, and inserting in lieu thereof the following matter, to wit:

1st. That said "The Central Pacific Railroad Company of California" and said "The Western Pacific Railroad Company" did on the 8th day of December, A. D. 1864, designate the general route of the railroad of said companies and file a map of the same in the Department of the Interior, which map also intended to show and did show the definite and final location of the route of said railroads of said companies; that afterwards the Secretary of the Interior did, on the 30th day of January, A. D. 1865, cause the lands within fifteen miles of said designated route of said "The Western Pacific Railroad Company" to be withdrawn from pre-emption, private entry, and sale, and that the lands hereinafter described and set forth were and are a portion of the lands so withdrawn.

That at the time of the filing of said map no pre-emption, homestead, swamp-lands, or other right or lawful claim had at-
44 tached to said lands hereinafter particularly described, nor did the same include any Government reservation, mineral lands, nor the improvements of any *bona fide* settler, or any lands returned or denominated as mineral lands, nor did the said defendants or either or any of them, their predecessors or grantors, have

any right, title, interest, or estate in or to said lands or any part or portion thereof.

A. H. GARLAND,
Attorney General of the United States of America,
On Behalf of the United States of America.
S. G. HILBORN,
United States Att'y.

(Endorsed:) Filed June 14th, 1885. L. S. B. Sawyer, clerk.

45 *Demurrer to Amended Bill.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER, SAMUEL DAVIS, SAMUEL B. MARTIN, J. WEST Martin, W. D. English, John R. Deardorff, Terrissa G. Taylor, Alfred E. Whitaker, George M. Taylor, F. S. Wensinger, John O'Hara, Rasmus Bjorn, Henry F. Crane, Statir'a A. Newell, as the Executrix of the Last Will and Testament of Thomas Newell, Deceased; Le Grand Morehouse, Andrew S. Barron, James Barron, The Bank of California (a Corporation); Franz Leberer, Patrick Armstrong, Margaret Armstrong, His Wife; Garrison Gerst, Charles G. Johnston, Rasmus H. Carsterson, Franziska Schweer, John Hinkle, Thomas W. Moore, Joseph Doe, Richard Roe, Thos. Roe, Chas. Roe, Frank Roe, and Daniel Roe, Defendants.

The defendants above named, by protestation, not confessing all or any of the matters and things in said complainant's amended bill contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said amended bill, and for cause of demurrer show—

First.

46 That said complainant hath not, in and by its said amended bill, made or stated such a case as doth or ought to entitle it in a court of equity to any such relief as is thereby sought and prayed for or to any relief as against these defendants or any of them as to the matters contained in said bill or any of such matters.

2nd. That it is apparent on the face of the said bill that the complainant has no interest in the subject-matter of the suit and no proper title or right to institute a suit concerning it.

3rd. That there is a defect in parties complainant, in that the grantees of the "Central Pacific Railroad Company" and the "Western Pacific Railroad Company" are not joined with complainant in the prosecution of this action.

4th. That said amended bill is multifarious, in that it appears on

the face of the said bill that there is an improper joinder of actions and misjoinder of parties defendant, specified as follows: That on page 8, line 46, to page 9, line 10, it is averred that the United States of America did to the State of California list certain specified and different lots of land, and that the listing of said different lots was done at divers times and by separate certified lists thereof; and it is averred on page 9, line 38, to page 10, line 20, that the State of California did, subsequent to each such listing, at divers times and dates and to various and different persons, patent said lots of land by separate and independent patents, and that said patentees are here joined as defendants, and said separate listings and patents made the subject-matter of this action.

47 Fifth.

That it appears on the face of said amended bill that the cause of action set forth therein did not accrue within ten years next before the filing of the original bill, and that the same is barred by the provisions of the fourth subdivision of section three hundred and thirty-eight of the Code of Civil Procedure of the State of California

Sixth.

It appears on the face of the said bill that the State of California is a necessary party to the suit, but it is not made a party nor is any reason stated why it is not.

Seventh.

It is alleged in the said bill that the Commissioner of the General Land Office listed the lands described in the bill to the State of California, "through error, inadvertence, and mistake," but there is an utter failure of the averment in the bill of any fact or facts constituting or tending to show such or any error, inadvertence, or mistake, or upon which issue can be taken in that regard.

Wherefore the defendants and each of them and all of them pray the judgment of this honorable court whether they or any of them shall be compelled to make any further or other answer to the said amended bill, and ask to be hence dismissed with their reasonable costs in this behalf sustained.

L. D. LATIMER,
H. F. CRANE,
THOS. D. CARNEAL, AND
ROTHCHILD AND BAUM,
48 *Solicitors for Defendants.*

L. D. LATIMER, *Counsel.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

L. D. LATIMER,
Counsel for said Defendants.

UNITED STATES OF AMERICA, } ss:
District of California, }

J. West Martin, one of the defendants aforesaid, being duly sworn, deposes and says that the foregoing demurrer is not interposed for delay.

J. WEST MARTIN.

Subscribed and sworn to before me this 31st day of July, A. D. 1885.

NEWTON BENEDICT,
[L. S.] *Notary Public.*

(Endorsed:) Filed August 3d, 1885. L. S. B. Sawyer, clerk.

49 At a stated term, to wit, the November term, A. D. 1885, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 18th day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Lorenzo Sawyer, circuit judge; the Honorable George M. Sabin, U. S. district judge of Nevada.

Order Overruling Demurrers to Amended Bill.

THE UNITED STATES OF AMERICA
vs. } No. 3106.
HENRY CURTNER *et al.*

This cause heretofore argued and submitted to the court for consideration and decision upon the demurrers to the amended bill of complaint herein having been duly considered, it is ordered that said demurrers be, and the same hereby are, overruled, the defendants to have till the rule day in March next to answer herein.

50 *Amended Answer of H. Curtner et al.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et als.*, Defendants.

Amended answer.

The answer of Henry Curtner, J. West Martin, Samuel B. Martin, W. D. English, Anna T. Taylor, George G. Taylor, F. S. Wensinger, Henry F. Crane, Thomas Newell, Le Grand Morehouse, Andrew S. Barron, James Barron, "The Bank of California," Franz Leberer, Charles G. Johnston, Rasmus H. Carstenson, Alfred E. Whitaker, John R. Deardorff, Patrick Armstrong and Margaret Armstrong, Francis Schweer, John Hinkle, and Thomas W. Moore, defendants, to the amended bill of complaint of The "United States of America," complainant.

Come now the above-named defendants, and, now and at all times hereafter saving and reserving unto them and each of them all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said complainant's bill of complaint contained, for answer thereto or unto so much and such parts thereof as said defendants are advised is or are material or necessary for them or either of them to make answer unto, said defendants, answering, say:

They deny that the said "The Western Pacific Railroad Company" or its successor, the "Central Pacific Railroad
51 Company," did, within three years from the completion of said "Central Pacific Railroad Company's" road or did at any time, sell and dispose or sell or dispose of the lands in controversy in this suit or any of them to persons other than the defendants or to any persons whomsoever.

The defendants admit, upon their information and belief, that on or about the 8th day of December, A. D. 1864, the general route of said railroad from Sacramento to San Jose was designated as near as may be upon a map or diagram by said railroad companies, and that such map or diagram was on or about that date filed by them in the Department of the Interior, but the defendants aver the fact to be that such map was made and filed solely and only in compliance with the seventh section of said act of Congress, approved July 1st, 1862, but they deny that said map was intended to show or did show the definite or final location of the route or line of said railroad, but aver the fact to be that the final survey of the line of said railroad was not made until in or about the month of April and May, A. D. 1868, which survey was on or about that date approved and adopted by said railroad company as the line of said railroad

as by them then and not before definitely fixed, as will be hereinafter in this answer more fully set forth.

These defendants deny that on the 30th day of January, 1865, or at any time, the Secretary of the Interior or any officer of the Interior Department did cause the lands within fifteen or any number of miles of said designated route of said railroad to be with-
52 drawn from pre-emption, private entry, or sale, but they aver the truth to be in that behalf that on the 23rd day of December, 1864, an order was made by the Commissioner of the General Land Office referring to a map of the general route of the Western Division of the Central Pacific railroad, viz., the route of said railroad from Sacramento to San Francisco by way of Stockton and San Jose, and directing that the vacant odd-numbered sections and parts of sections within twenty-five miles on each side of said route as indicated by said diagram or map be withdrawn from pre-emption, private entry, and sale, and not otherwise; but these defendants deny that the lands in controversy in this suit were vacant lands or were any portion of the lands so withdrawn as aforesaid, and they deny that at the time of the filing of said map or diagram no other right or claim had attached to said land, as will be hereinafter more fully and at large set forth, and they deny that the same were not included in a reservation, as will be hereinafter more fully explained and set forth; and the defendants deny that said lands did not include the improvements of any *bona fide* settler, and they deny that said defendants or their predecessors or grantors did not have any right, title, or interest in or to said lands, but aver the fact to be that these defendants and their grantors did have a lawful claim to said lands and each and every portion thereof, as in this answer is hereinafter more fully set forth.

These defendants deny that the lands in controversy and mentioned and designated in the complainant's bill or any of them
53 are a portion of the lands to which the said "The Western Pacific Railroad Company" or any railroad company were entitled to have or receive patents of the United States for by reason of said acts of Congress or for any reason, and they deny that said railroad companies or either of them were entitled to have or receive patents of the United States conveying to them or either of them every alternate section of public land designated by odd numbers in the public-land surveys of the United States to the amount of five alternate sections or any number of sections per mile on each side of said railroads or the line thereof within the limits of ten miles on each side of said road—that is to say, they were not entitled to any of said lands which may have been sold, reserved*ed*, or otherwise disposed of by the United States at the time the line of said road was definitely fixed, to which class of land the lands in controversy belonged, as will hereinafter be fully shown.

1. The defendants deny and say that it is not true that the Commissioner of the General Land Office did, on the 8th day of September, 1870, or on the 11th day of March, 1871, or on the 15th day of November, 1871, or on the 24th day of March, 1873, or at any time without right, through error, inadvertence, by mistake, or wrong-

fully list by certified lists or in any manner by any error, inadvertence, mistake, or wrong did list or certify over to the State of California the lands designated in complainant's bill or any of them; but these defendants do aver and say and the truth in that behalf is that heretofore and long before any route or line of railroad had been designated, laid out, adopted, or projected through that
54 part of Alameda county, California, where said lands are situate, to wit, prior to the month of August, A. D. 1864, and under and by virtue of the laws and statutes of the State of California in that behalf made and adopted by the Legislature of the State and in part satisfaction of the grant made by the Congress of the United States of the 16th and 36th sections of land in each township in said State or other land in lieu thereof under the act of Congress entitled "An act to provide for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853 (10 U. S. Stat. at Large, 244), the State of California, by its proper officers, selected and located out of the public lands of the United States in said State the several pieces, parcels, and tracts of land mentioned and designated in the complainant's bill herein and then and there sold the same in separate tracts and parcels to each of the several grantors of each of the defendants herein; that each of the said grantors of the defendants severally then and there became a purchaser in good faith of each of said several tracts of land so sold to him by the State, and each of said purchasers paid to the State the purchase price of the tract of land so sold to him, and the State issued and each of said purchasers received from the State it- certificate of purchase for each of said tracts of land so sold to him; that such certificate of purchase gave to each of said purchasers so receiving it the right to the immediate and exclusive possession of the tract of land described therein, and the State by its said certificate undertook, promised, covenanted,
55 and agreed, in consideration of the purchase price so paid to the State, to procure for and grant unto said purchaser or his assigns the absolute title to said land.

That said several tracts and pieces of land were so selected and located by the State in lieu of and as indemnity for certain 16th and 36th sections of land or portions of such sections that had become lost to the State pursuant to the terms and provisions of said grant to the State by Congress.

That under and by virtue of said several purchases by these defendants and their grantors and the issuance to them of said certificates of purchase they and each of them then and there and in or about the year 1864 entered into and upon each of said several tracts of land by him so purchased, and they, by themselves and their grantors, have since that date, to wit, for a period of over twenty years, each held the actual, adverse, exclusive, undisputed, open, and notorious possession of each of said tracts of land and have made costly and valuable improvements thereon, and up to the time of the commencement of this suit (to wit, July 23d, 1883) these defendants and neither of them had any notice or knowledge that said several tracts

of land or any of them were claimed under the said railroad grant mentioned in complainant's bill.

That at the date of said selection and location by the State aforesaid and the issuance of said certificates of purchase and for many years afterwards there was no sign or indication of any railroad route or projected line of railroad in or through that part of Alameda county, California, where these tracts of land are situate; that
56 in or about the months of April and May, in the year 1868, one S. S. Montague, acting as the chief engineer of the Central and Western Pacific Railroad Companies, did make or cause to be made, for and on behalf of said companies, a survey on the ground of the line of said railroad, and did at that date locate said line and route on the ground from the end of the first twenty-mile section, to wit, from Alameda canyon, to the city of Sacramento, and did at that date actually cause to be surveyed and marked upon the ground the line or route of said railroad from the end of the 20-mile section aforesaid, thence northerly to some point at or near the city of Sacramento; that by such survey and location the line of said railroad was first definitely fixed, and said line and route was adopted and approved by said companies and said road built thereon in the years 1868 and 1869 by them.

That long prior to the time when the line of said railroad was definitely fixed, to wit, on the 23rd day of July, A. D. 1866, the United States, by an act of Congress entitled "An act to quiet land titles in California," approved on that date, had otherwise disposed of the land in controversy in this action by confirming the same, and the selection, location, and sale thereof by the State as aforesaid to the State of California and by said act prescribed the mode and manner whereby the grantors of these defendants should receive the absolute title of the United States to said lands; that under and in pursuance of said act of Congress the claims of the defendants and their grantors to said several tracts of land became and were confirmed by said act of Congress, and said claims were
57 afterwards presented to the proper land department of the United States and proved up to the satisfaction of the Commissioner of the General Land Office and the Secretary of the Interior, who each found said claims to be in accordance with section one of said act of Congress; whereupon said claims were approved by said officers, and said lands were thereupon, by the said Commissioner of the General Land Office, certified over to the State of California and by the State patented to the defendants or their grantors, and these defendants are now the grantees of the persons named in complainant's bill as the persons to whom the State of California issued her patents for the same on the 9th of November, 1870, on the 3rd of February, 1871, on the 6th of April, 1871, on the 29th of November, 1871, on the 18th of May, 1872, on the 5th of April, 1873, and on the 4th of March, 1878.

That thereupon the State of California was charged by the United States, and The United States, the complainant herein, received a credit of so much land in part satisfaction of said congressional grant of March 3rd, A. D. 1853.

That these defendants and their grantors did in all things comply with and perform all and singular their and each of their contracts, covenants, and obligations in the premises to the State and the United States and the said listing and certification of said lands to the State in the same listing mentioned and complained of in the complainant's bill herein; and these defendants further say that said Secretary of the Interior and Commissioner of the General Land
58 Office, at the times of said listing and certification of said land over to the State of California, to wit, on the 8th of September, 1870, on the 11th of March, 1871, on the 15th of November, 1871, and on the 24th of March, 1873, and for many years prior thereto, had full and complete knowledge and information of all the facts concerning the rights and claims of the said Central and Western Pacific Railroad Companies and their grantees of, in, and to said land, and knew that they were odd-numbered sections and portions of such sections of land lying within ten miles from and along the line of said railroad, and knew every other fact concerning said lands and claims as fully as the same are known at the present time by the complainant or any of its agents or officials.

2. That said several pieces and tracts of land are situate in a place known as the Livermore Valley, distant about thirty miles from the city of Oakland, in the county of Alameda, State of California, and from fifteen to twenty-five miles northerly from the point known as the westerly end of Alameda canyon, or the end or terminus of the first twenty-mile section of said railroad from San Jose.

That during the twelve years last passed said lands have greatly increased in value, viz., they have more than doubled their market value, and they are now of the market value of over $50,000, inclusive of the improvements placed thereon by the defendant- and their grantors; that during the period last named and for about fifteen years last past the official record of Alameda county, the State
59 land office at Sacramento, the United States land office in San Francisco, and the General Land Office of the United States, at the city of Washington, have shown and do show the clear, legal title of each of said tracts of land to be vested in and held by these defendants or their grantors; and these defendants aver the fact to be that they and each of them purchased each his several tract of said land in good faith and paid the full market value for said land so purchased and without any notice or knowledge of any claim or asserted right to said land by said railroad company or any person or persons claiming under said railroad company or under said grant to said railroad company or otherwise; that neither the complainant, The United States, -or any official or agent thereof or other person whomsoever has at any time given the defendants or any of them any notice that said tracts of land or any of them were so claimed, and no demand or request has at any time been made on behalf of the complainant or any person or persons or on behalf of said railroad company or its grantees or any of them; that they, the defendants, or any of them do surrender their title or reconvey said land to any person or to the complainant or otherwise, and no demand or request of any kind whatever in or about or concerning

said land or any part thereof or in or about or concerning the matters set forth in the bill of complaint has at any time been made upon the defendants or any of them.

3. These defendants deny and say that it is not true that
60 from the 1st day of July, 1862, until the 29th day of December, 1869, said lands or any of them were public lands of the United States; but they aver the fact to be, as hereinbefore stated, that since some time prior to August, A. D. 1864, such lands were subject to the claim of the State and her purchasers, and they deny that at said last-named date or at any time after August, 1864, said lands had not been sold, reserved, or otherwise disposed of by the United States, or that no pre-emption claim had attached to the same at the time the line of said railroad was definitely fixed, and they deny that said lands were not excepted from the operation of said railroad grant, and they deny that no pre-emption or lawful claim had attached to said land other than that of said railroad companies at the times mentioned in said bill of complaint, and they deny that there was no Government or other reservation of the said lands, but they aver the truth to be in that behalf that said lands and all of them were at all times from the year 1860 and long prior thereto and until the sixth day of June, 1871, in a state of reservation and never at any time could have passed to said railroad company under its grant, as will be in this answer hereinafter more fully and at large shown, and they deny that the President of the United States refused to issue a patent for said lands to said railroad company solely or at all because said land had been by mistake or inadvertently listed to the State of California, and they deny that said listing was not discovered by the complainant or its officers or by the "Central Pacific Railroad Company" or its grantees until
61 the 12th day of May, 1874, but they aver the fact to be that said listing and certification of said land over to the State and all the facts connected therewith was well known to the complainant and its officers and also to said railroad company and its grantees at the divers and sundry times that said land was so listed to the State, and they deny that the defendants or any of them had any actual or other notice or knowledge concerning the withdrawal of said or any lands in 1864 or any time until after the commencement of this suit, and they deny that said lands were at any time withdrawn, as is in this answer more fully shown, and they aver the fact to be that the decision of the Commissioner of the General Land Office in 1878, purporting to award said land to the railroad company, was made in an *ex parte* proceeding instituted by said railroad company long after the claims of the defendants and their grantors had been approved and after said lands had been certified over to the State and patented to the defendants or their grantors and at a time when said Commissioner and Secretary of the Interior had long ceased to have any power or authority concerning the disposition of said land or the subject-matter of any proceeding concerning the same; and these defendants deny that said Wm. D. English or any person did, on the 25th of May, 1878, or at any time, appear in said proceeding or file an appeal therein or take any step or do any act in said

or any proceeding for or on behalf of these defendants or any of them, and deny that said English has any interest in said land or
62 any part thereof *on* the subject-matter of this suit.

4. These defendants admit, from information derived from the bill of complaint since the commencement of this suit, and not otherwise, that at some time in or about the month of February, 1878, a demand was made by the then Commissioner of the General Land Office upon the State of California that the State do relinquish its title to the lands in controversy herein to the United States; that the State did not comply with such demand; and the defendants aver the fact to be that the State, at the date mentioned, had parted with such title and could not comply with such demand, all of which was well known to said Commissioner and the complainant and its officers and agents; but the defendants deny that such failure on the part of the State to relinquish such title has resulted in any damage or injury to the complainant, The United States, and they deny and it is not true that the complainant is bound in equity and good faith or bound in any manner whatever to hold harmless the said "Central Pacific Railroad Company" or its grantees or assigns from the consequences of the errors or mistakes of the officers or agents of the complainant or in particular from any error or mistake of the said Commissioner in listing said lands to the State of California; and the defendants aver in that behalf that the complainant has no interest, legal or equitable, in this suit, and they aver the truth to be that this suit was not commenced and is not and has not at any time been prosecuted by the complainant, The United States of America, or by any of its officers or agents or by any person in privity with or employed by said complainant; that it is a suit commenced and prosecuted by private
63 persons and for and on behalf of their own private interests only, and commenced and conducted by their own private attorneys and counsel; that it is a case in which private persons, to wit, certain so-called grantees of the "Central Pacific Railroad Company," whose names are unknown to the defendants, have procured leave of the Attorney General of the United States for themselves to have and use the name of the "United States of America" as the nominal complainant herein, in consideration of a bond given by them conditioned to save the complainant harmless from any cost incurred herein, and that the primary purpose and object of said private persons in so doing is to escape the payment of costs herein and to evade the bar of the statute of limitation of the State of California, under which their pretended claims have long since become stale and outlawed; and the defendants aver and say that no cause of action has accrued to the complainant or the real parties in interest, viz., the grantees of said railroad company, on whose behalf this suit is brought, as to the matters set forth in the bill of complaint, within ten years next before the filing of said bill.

5. And the defendants further aver and say that their and each of their several interests in said land mentioned in complainant's bill of complaint is as follows, to wit:

The defendant Henry Curtner is the sole owner of the west half

and northeast quarter of section 15 and the east half of section 21, township 2 S., R. 1 E., Mount Diablo merid-an, containing eight hundred acres of land, and he disclaims having or claiming any interest of, in, or to any other of the land mentioned in said bill of complaint.

64 The defendant J. West Martin is the sole owner of the whole of section 13, township 2 S., R. 1 E., Mount Diablo merid-an, con. six hundred and forty acres of land, and he disclaims having or claiming any interest of, in, or to any other of the land mentioned in said bill of complaint.

The defendant Rasmus H. Carstenson is the sole owner of the N. E. quarter of section 33, township 2 S., R. 1 E., Mount Diablo merid-an, containing 160 acres of land, and he disclaims having or claiming any interest of, in, or to any other of the land mentioned in said bill of complaint.

The defendant John Hinkle is the sole owner of the N. half of section 35, township 2 S., R. 1 E., of Mount Diablo merid-an, containing 320 acres of land, and he disclaims having or claiming any interest of, in, or to any other of the land mentioned in the bill of complaint.

The defendant- George G. Taylor and Anna T. Taylor are the sole owners of an undivided half interest of, in, and to the S. half of section 35, township 2 S., R. 1 E., of Mount Diablo merid-an, containing 160 acres of land, and they disclaim having or claiming any interest of, in, or to any other of the land mentioned in said bill of complaint.

The defendant Andrew S. Barron is the sole owner of the N. W. quarter of section 19, and about seventy acres in the W. half of the N. E. quarter of said section 19, in township 3 S., R. 3 E., Mount Diablo merid-an, containing in all about 269 acres of -and, — he disclaims having or claiming any interest of, in, or to any other of the land mentioned in said bill of complaint.

65 The defendant Le Grand Morehouse is interested in said land of Andrew S. Barron aforesaid, in this, to wit, that he holds a mortgage thereon to the amount of about $3,000, and disclaims having any interest in any other of the lands in question herein.

The defendants "The Bank of California," Henry F. Crane, Charles G. Johnston, and Thomas W. Moore are the sole owners of the W. half of section 21, in township 3 S., R. 3 E., Mount Diablo merid-an, containing 320 acres of land, and they disclaim having any interest of, in, or to any other of the land mentioned in said bill of complaint, except the said Henry F. Crane is the sole owner of about 50 acres in the N. half of the N. E. quarter of section 19, in the same township, and he disclaims having any interest in any other of the land mentioned in said bill of complaint.

The defendant Franz Leberer is the sole owner of the S. E. quarter of the N. E. quarter of section 19, in township 3 S., R. 3 E., Mount Diablo merid-an, containing forty acres of land, and he disclaims having any interest of, in, or to any other of the land mentioned in said bill of complaint.

The defendants Alfred Whitaker and John R. Deardorff are the owners of an undivided one-half interest of, in, and to the S. ½ of section 35, township 2 S., R. 1 E., Mount Diablo merid-an, Alameda county, California.

The defendants Patrick Armstrong and Margaret Armstrong, his wife, are the owners of the S. ½ of the S. W. ¼ and the S. W. ¼ of the S. E. ¼ of section 17, township 3 S., R. 3 E., Mount Diablo merid-an, Alameda county, California.

The defendants further aver, upon and according to their
66 information and belief, that the defendants Samuel D. Martin, W. D. English, F. S. Wensinger, Thomas Newell, James Barron, and Francis Schweer have no interest whatever in any of said lands or the subject-matter of this suit.

Separate Defense.

And now, for a separate defense herein, these defendants say that the complainant ought not to have or maintain this suit against them on account of any pretended or real violation of the rights of said railroad company or its grantees under said congressional grant, because the- aver and allege the truth to be in that behalf as follows, to wit:

A. That the line of said railroad was not definitely fixed until about the month of May, A. D. 1868, and that said railroad was fully — on or about the 29th day of December, A. D. 1869, as stated in complainant's bill.

B. And these defendants further aver and say that in or about the month of April, A. D. 1839, the Mexican Government made a grant of land in California to certain persons, viz., Jose Noriega and Robert Livermore, whereby a certain tract of land was granted to them, known and called "Las Pocitas," which tract of land was and is described in said grant as follows, to wit: "Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west — the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the said boundaries; and if less than that quantity be found to be contained therein, then that less quantity and all of said described tract of land."

67 C. That on the 27th day of February, A. D. 1852, said Noriega and Livermore petitioned the board of land commissioners appointed under the provisions of an act of Congress entitled "An act to ascertain and settle the private land claims in the State of California," approved March 3rd, A. D. 1851, to have said grant and claim confirmed, and on the 14th day of February, 1854, said board made their decision and decree confirming the same to said Noriega and Livermore, their heirs and assigns, and the said board in and by their decree of confirmation described the land so confirmed in words and figures as follows, to wit: "Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of

San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed."

D. That on the 18th day of February, A. D. 1859, under and by virtue of proceedings had and taken for reviewing the decision of said commissioners in said matter by the district court of the United States for the northern district of California, said court did, upon the pleadings, documents, records, and evidence in said cause, make and cause to be entered in the records of said court its judgment and decree therein, whereby said grant and claim was by said court confirmed to Noriega and Livermore, their heirs and assigns, to
68 the same extent and for the same tract of land and by the description and condition as was and is contained in the decree of said board of commissioners, and said court did in all things affirm the said decree of said board.

E. That on the 14th day of January, 1861, the Supreme Court of the United States, on an appeal from said judgment and decree of the said district court aforesaid, did in all things affirm said last-named judgment and decree, and on the 24th day of February, 1865, upon the filing of the mandate of the Supreme Court aforesaid in said district court, said last-named court made and entered its order to the effect that said claimants, their heirs and assigns, be permitted to proceed under said decree and judgment of said district court as under and upon a final decree and judgment of confirmation.

F. That the land designated in complainant's bill herein as having been listed to the State of California by inadvertence and mistake because in violation of the rights of said railroad company or its grantees lies and is wholly situate within the boundaries of said grant as the same are indicated and set forth in said grant itself and said final decree of confirmation, and said lands form and are a part and parcel of the larger tract embraced and included within said boundaries as the same are set forth in said decree.

G. That in or about the month of September, A. D. 1865, for the purpose of procuring a patent from the United States for the land belonging to said claimants and to which they deemed themselves entitled under said grant and decree of confirmation, the heirs and assigns of said Noriega and Livermore caused and procured
69 the surveyor general of the United States for the State of California, by his deputy, one E. H. Dyer, to make, and he did, under the usual directions and instruction of the said surveyor general in such cases, make an official survey of said grant out of the tract of land embraced and included within the boundaries set forth in said grant and decree of confirmation, and did construct such survey into a plat, which, with his field-notes and other papers pertaining thereto, were returned and filed in the office of said surveyor general; and on the 8th day of February, A. D. 1867, said survey, field-notes, and plat were adopted and approved by the said surveyor general, and the same, or duplicate originals thereof, were by said surveyor general transmitted to and filed in the office

of the Commissioner of the General Land Office of the United States, at the city of Washington, District of Columbia; and in or about the month of July, 1868, the said survey, plat, and field-notes were adopted and approved by the said Commissioner of the General Land Office of the United States.

H. That the said several tracts of land designated in complainant's bill as having been inadvertently and by mistake listed to the State of California, in violation of the rights of said railroad company and its grantees, are each and all of them embraced by said survey and plat and are included within and are a part of the tract of land so segregated by said survey in satisfaction of the claim of said grantees and their heirs and assigns under said grant and decree of confirmation.

I. That on the 30th day of July, A. D. 1868, the Secretary of the Interior of the United States disapproved of said survey and
70 plat on the sole ground, and no other, that the same embraced more than two leagues of land, as called for by said grant, and thereupon ordered and directed that a new survey be made of said grant, which should contain but two square leagues of land, and in the month of May, 1869, the said surveyor general, under and by virtue of said order and instruction of said Secretary, caused said grant and claim to be again surveyed out of land within said boundaries thereof, and such survey was made and approved by him on the 11th day of May, 1870, and the same was approved by the said Commissioner of the first day of March, 1871, and said survey was finally approved by the Secretary of the Interior on the 6th day of June, 1871, and on the last-named date said survey, plat, and field-notes became the settled and final survey of said grant, Las Pocitas, upon which a patent was issued on the 20th day of August, 1872, which survey and patent embrace about two leagues of land and do not include the land in controversy in this action, but all of said tracts were held and were in a state of suspension and reservation for the purpose of satisfying the claim under said grant until after the 6th day of June, 1871, and until the survey of said grant became final, and no right, title, or interest of, in, or to said land or any part thereof ever inured to or vested in said railroad company or its grantees under said congressional grant or otherwise.

Wherefore the defendants pray that said complainant's bill be dismissed, and that they do have and recover judgment for their costs and disbursements in this action most wrongfully sustained.

HENRY F. CRANE,
Solicitor for Defendants.

J. C. MARTIN, *Of Counsel.*

71 STATE OF CALIFORNIA, } *ss:*
County of Alameda, }

J. West Martin, being duly sworn, doth depose and state upon his oath that he is one of the defendants in the above-entitled suit; that he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge, except as

to the matters therein stated on his information and belief, and — to those matters that he believes it to be true.

J. WEST MARTIN.

Subscribed and sworn to before me this 24th day of September A. D. 1886.

[L. S.] NEWTON BENEDICT,
Notary Public.

(Endorsed:) Service hereof admitted this 24th day of September, 1886. Shafter, Parker & Waterman, solicitors for complainants. Filed September 24th, 1886. L. S. B. Sawyer, by J. D. Moncton, deputy clerk.

72 At a stated term, to wit, the July term, A. D. 1886, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 18th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Substituting Geo. G. & Anna T. Taylor Def'ts.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et al.*, Defendants. } No. 3106.

The death of George M. Taylor and Terrissa G. Taylor, his wife, each defendants in this cause, having been suggested to the court, and it appearing that Anna T. Taylor and George G. Taylor are the sole surviving children and heirs-at-law of said George M. and Terrissa G. Taylor, deceased, and whereas it appears that said Anna T. Taylor is of full and lawful age and the said George G. Taylor is of the age of 20 years and a minor, now, on motion of Messrs. Shafter, Parker and Waterman, it is hereby ordered that said Anna T. Taylor and George G. Taylor be, and they are hereby, substituted in place of said George M. and Terrissa G. Taylor, deceased,
73 and are also hereby made parties defendant herein, and that the complainant have leave to amend the bill by inserting their names as defendants herein.

And it is further ordered that Henry F. Crane, Esq., be, and he is hereby, appointed as guardian *ad litem* for said George G. Taylor to appear herein on his behalf.

(Endorsed:) "Copy of order substituting Anna T. Taylor and George G. Taylor resp'd'ts in place of Geo. M. and Terrissa G. Taylor, deceased."

74 *Amendment to Amended Bill.*

In the Circuit Court of the Ninth Circuit of the United States of America for the District of California.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et al.*, Defendants. } No. 3106.

By leave of the court the complainant amends the amended bill herein by striking out therefrom paragraph eleven (11) and inserting in lieu thereof the following, viz:

11. "That said Central Pacific Railroad Company of California, in the month of October, 1864, did designate the general route of its said road as near as may be, and did on the 8th day of December, 1864, file a map of the same in the Department of the Interior; whereupon the Secretary of the Interior did, on the 30th day of January, 1865, cause the lands within twenty-five miles of such designated route to be withdrawn from pre-emption, private entry, location, and sale, and the lands hereinafter described are a part of the lands so withdrawn; that afterwards and on, to wit, the 1st day of February, 1870, the said Western Pacific Railroad Company filed in the Department of the Interior a map of the line of its said road as finally and definitely located and fixed, which map was duly accepted as such by the Secretary of the Interior; whereupon the line of said Western Pacific Railroad Company's road became and was definitely fixed on said 1st day of February, 1870; that from and after the said 30th day of January, 1865, up to the time
75 of the said filing and acceptance of said map of definite location on said 1st day of February, 1870, the lands hereinafter described were and continued to be appropriated, withdrawn, and reserved for the use and benefit of said Western Pacific Railroad Company, and were not otherwise reserved, disposed of, or sold, nor had any pre-emption or homestead claim attached thereto, nor were the same mineral lands or swamp lands, nor were they subject to any other lawful claim, nor were they included in any Government reservation, nor were they located or selected to be located under the provisions of an act entitled 'An act donating lands to the several States and Territories which may provide colleges for the benefit of agriculture and mechanic arts,' approved July 28, 1862, nor were they otherwise excepted from the grant to said company."

A. H. GARLAND,
Attorney General of the United States,
on Behalf of the United States.

JOHN T. CARY,
United States District Attorney, Northern District of California,
SHAFTER, PARKER AND WATERMAN,
Of Counsel for Complainant.

(Endorsed:) Received a true copy of the within amendment this 3d day of January, 1886. H. F. Crane, solicitor for def'ts. Filed January 3d, 1887. L. S. B. Sawyer, clerk, by F. D. Monkton, deputy clerk.

76 *Amendment to Amended Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et als.*, Defendants. } No. 3106.

Now come the defendants and, by leave of court first had and obtained, amend their amended answer filed herein on the 24th day of September, 1886, by striking out all that part of said amended answer from and including line 40, page 1, down to and including line 26 on page 2 thereof, and inserting in lieu thereof the following, viz:

The defendants admit that in or about the month of October, 1864, said railroad company did cause to be designated the general route of said railroad as near as may be upon a map or diagram, and on the 8th day of December, 1864, did cause said map to be filed in the Department of the Interior, but they deny that thereupon and on the 30th day of January, 1865, or at any time the Secretary of the Interior or any officer of the Interior or Land Department did cause the lands within 25 miles or any number of miles of such designated route to be withdrawn from pre-emption, private entry, location, or sale, but they aver the truth in that behalf to be that on or about said last-named date an order was made by the Commissioner of the General Land Office which refer-ed to a map or diagram of the general route of the Western Division of the Central Pacific railroad from Sacramento to San Francisco by way of Stockton and San Jose, and directed that the vacant odd-
77 numbered sections and parts of such sections within 25 miles on each side of said route as indicated on said map and diagram be withdrawn from pre-emption, private entry, and sale; that said order was made in obedience to the provisions of the 7th section of the act of Congress known as the railroad act of July 1st, 1862, in that behalf and not otherwise.

But the defendants aver the truth in that behalf to be that the lands in controversy in this suit and none of them were at that time vacant odd-numbered sections or parts of such sections, and were no part or portion of the lands mentioned in said act of Congress and said order, and were in no manner affected by the filing of said map of the designated general route of said railroad or by said order or otherwise.

And the defendants aver the truth in that behalf to be as follows, viz: The lands in controversy in this suit are situate in two separate and different townships, to wit, a certain portion of said lands

are situate in township 3 S., R. 3 E., Mt. Diablo merid-an, and another portion in township 2 S., R. 1 E., Mt. Diablo merid-an; that in or about the month of August, 1862, the surveyor general of the United States for the State of California caused said township 3 S., R. 3 E., Mt. Diablo Md., to be surveyed in the field and to be sectionized and subdivided into legal subdivisions of sections and quarter sections, and caused such survey to be constructed into and upon a plat, and on the 24th day of December, 1862, said surveyor general approved such survey and plat, which has since been and now remains the official plat of said township; that in or
78 about the month of January, 1863, said surveyor general caused a duplicate copy of said township plat to be transmitted to and filed in the General Land Office, in Washington, and, as the defendants are informed and verily believe, another duplicate copy of said township plat was by him at the same time caused to be filed in the United States land office in San Francisco.

That at divers dates in the year- 1863 and 1864 and long prior to the designation of the general route of said railroad as aforesaid the State of California, under and by virtue of the laws of said State and in part satisfaction of the grant by the United States to the State of the 16th and 36th sections of lands in each township or other lands in lieu thereof, selected and located the lands in controversy in said last-named township, and sold the same in separate parcels and tracts to the grantors of certain of the defendants herein, who each paid to the State the purchase price thereof and received from the State a certificate of purchase for each of said tract of land so purchased and entered into actual possession thereof under the same.

That long prior to the designation of the general route of said railroad or of the filing of said map of such route each of said selections and locations had been, by the proper authorities of the State of California, presented for approval at the United States land office at San Francisco, and at divers dates in the year- 1863 and 1864 each of said selections and locations were by the register of said land office approved, and each of them were by him entered of record in the regular tract book of entries in said land office, where the
79 same have since and do now remain of record.

That it was upon and by virtue of the above selections, locations, and sales that said claims were by the Commissioner of the General Land Office and Secretary of the Interior, in the years 1871 and 1873, approved, and that said lands were by the Commissioner certified over to the State of California and by the State patented to the defendants and their grantors, and these are a portion of the listings of lands charged in complainants' bill to have been made by inadvertence and mistake; that as to the lands in controversy situate in township 2 S., R. 1 E., Mt. Diablo merid-an, with the exception of section 35, the same and all of them were at divers dates during the years 1862 and 1863 and long prior to the designation of the general route of said railroad selected and located in separate tracts and parcels by the State of California under and by virtue of the laws of the State and in part satisfaction of the grant by the United

States to the State of the 16th and 36th sections of lands in each township or other lands in lieu thereof, and were by the State sold in separate tracts to certain of the grantors of the defendants herein or some of them, who paid to the State the purchase price therefor, and each received a certificate of purchase for the tract of land so purchased by him and each entered into the actual possession thereof under the same.

That in or about the month of March, 1865, the surveyor general of the United States for the State of California caused said township 2 S., R. 1 E., Mt. Diablo merid-an, to be surveyed in the field, sectionized and subdivided into legal subdivisions of sections and quarter sections, and caused such survey to be constructed into
80 and upon a plat, and on the 6th day of April, 1865, said surveyor general approved said survey and plat and caused a duplicate of said township plat to be filed in the United States land office at San Francisco on the 10th day of June, 1865; that each of said selections and locations by the State as aforesaid were by the proper authorities of the State of California, on or about the 12th day of June, 1865, presented for approval at the United States land office in San Francisco, and the same and each of them were then and there approved by the register of said land office, and were by him entered of record in the regular tract book of entries in said land office, where the same have since remained and do now remain of record; that it was upon and by virtue of the above selections, locations, and sales that said claims were by the Commissioner of the General Land Office and the Secretary of the Interior, in the years 1870 and 1871, approved, and that said lands were by the Commissioner certified over to the State of California and by the State patented to the defendants and their grantors, and these are a portion of the listings of lands charged in the complainants' bill to have been made by inadvertence and mistake because of the pretended superior right of the railroad company to such lands.

That as to said section 35, in township 2 S., R. 1 E., the State of California did, some time in the year 1865, in like manner make separate selection and location of the N. ½ and S. ½ of said section; that such selections and locations were by the proper authorities of the State presented for approval at the United States land office at San Francisco, and on the 13th day of June, 1865, said selec-
81 tions and locations were by the register of said land office approved, and were by him entered of record in the regular tract book of entries of said land office, where the same have since remained and do now remain of record.

That on the 9th day of December, 1870, the State of California sold the south ½ of said section to the grantor of certain of the defendants herein, and the north ½ of the same to the grantor of another of the defendants in this cause, who each paid the State the purchase price for said land and received from the State a certificate of purchase therefor.

That it was upon and by virtue of said selections and locations that said claims of the State were approved by the Commissioner and Secretary of the Interior, and that said land was, on the 8th day

of September, 1870, by the said Commissioner certified over to the State of California and by the State patented to the grantors of the defendants above mentioned and referred to, and these are a portion of the listings of lands to the State charged in complainants' bill to have been made by inadvertence and mistake.

The defendants admit the truth to be as stated in the amended bill of complaint, to wit, that the line of said railroad was finally located and definitely fixed on the first day of February, 1870; but they deny and say that it is not true that from and after the 30th day of January, 1865, up to the 1st day of February, 1870, or at any time the lands in controversy or any of them continued to be or were at all appropriated, withdrawn, or reserved for the use or benefit of said Western Pacific Railroad Company or any railroad company.

82 And the defendants deny and say that it is not true that said lands were not otherwise reserved or not otherwise disposed of or sold, and deny that they were not subject to any other lawful claim, but the defendants aver the truth in that behalf to be that long before any estate, right, title, or claim of said railroad company could have attached to said lands or had attached to any lands along the general route or line of said railroad the claims of the defendants and their grantors to the lands in controversy had become and were existing, equitable, and valid claims and been recognized, approved, and entered of record in the proper land office of the United States and the State of California, and said claims were then pending and awaiting only the approval of the Secretary of the Interior and such further proceedings in the General Land Office of the United States as were required to perfect the legal title of said lands in the defendants and their grantors.

And the defendants do hereby further amend their said amended answer by striking out all that part of the same from and including line 43, on page 3, down to line 7, on page 4, and insert in lieu thereof as follows, viz: "That between the 28th day of January and the 15th day of December, 1868, on- S. S. Montague, acting as the chief engineer of said railroad companies, did cause to be made for and on behalf of said companies a survey on the ground of the line of said railroad, and did locate said line on the ground from the end

83 of the first 20-mile section, to wit, from Alameda Canyon, to Sacramento, and said line was afterward adopted and approved by said companies, and said railroad was built and constructed on said line during the year 1869, and on the 1st day of February, 1870, the said Western Pacific Railroad Company caused to be filed in the office of the Secretary of the Interior its map of the definite and final location of the line of said railroad.

H. F. CRANE,
Solicitor for Defendants.

STATE OF CALIFORNIA, } ss :
County of Alameda, }

J. West Martin, being first duly sworn, doth depose and say that he is one of the defendants in the above-entitled suit; that he has

heard the foregoing amendments to the amended answer read and knows the contents thereof, and that the same are true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters that he believes them to be true.

J. WEST MARTIN.

Subscribed and sworn to before me on this 6th day of January, A. D. 1887.

NEWTON BENEDICT,
[SEAL.] *Notary Public.*

Indorsed: We admit service of a copy of the within on this 6th day of Jan'y, 1887. Shafter, Parker & Waterman. Filed January 6, 1887. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

84 *Replication to Amended Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et al.*, Defendants.

Replication to amended answer.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the amended answer of said defendants, for replication thereunto saith that it doth and will aver, maintain, and prove its said amended bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the amended answer of said defendants is uncertain, evasive, and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in the said amended answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said amended bill it hath already prayed.

Dated Feb'y 1st, 1887.

JOHN T. CAREY,
United States Attorney for California.

SHAFTER, PARKER AND WATERMAN,
Of Counsel for Complainant.

85 *Enrollment.*

Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et al.*, Respondents. } No. 3106.

The complainant filed its bill of complaint herein on the 23rd day of July, 1883, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the 3rd day of September, A. D. 1883, which is here*by* annexed.

Certain of the respondents appeared herein on the 5th and 13th days of November, 1883, by Mich. Mullany, Rothschild and Baum, and H. F. Crane, Esqs., their solicitors.

On the 30th day of November, 1883, two demurrers were filed herein, which are hereto annexed.

On the 3d day of December, 1883, another demurrer was filed herein and is hereto annexed.

On the 14th day of July, 1884, an order of dismissal as to certain defendants was made and entered herein, a copy of which order is hereto annexed.

On the 25th day of August, 1884, an order confessing said demurrers was made and entered herein, a copy of which order is hereto annexed.

On the 23rd day of December, 1884, an amended bill of complaint was filed herein and is hereto annexed.

A demurrer to said amended bill of complaint was filed herein on the 6th day of January, 1885, and is hereto annexed.

86 An amendment to the amended bill of complaint was filed herein on the 14th day of July, 1885, which amendment is hereto annexed.

A demurrer to amended bill of complaint was filed herein on the 3rd day of August, 1885, and is hereto annexed.

An order overruling said demurrers was made and entered herein on the 18th day of January, 1886, a copy of which order is hereunto annexed.

Answers were filed herein on the 9th and 10th days of March, 1886, and are hereto annexed.

An amendment to answer was filed herein on the 18th day of March, 1886, and is hereto annexed.

A replication to answer was filed herein on the 5th day of April, 1886, which is hereto annexed.

An amended answer was filed herein on the 4th day of September, 1886, and is hereto annexed,

On the 18th day of October, 1886, an order of substitution of certain defendants was made and entered herein, a copy of which order is hereto annexed, and the appearance of the defendants so

substituted was thereupon entered, by H. F. Crane, Esq., their solicitor.

An amendment to the amended bill of complaint was filed herein on the 3rd day of January, 1887, and is hereto annexed.

Amendments to amended answer were filed herein on the 6*rd* day of January, 1887, and are hereto annexed.

A replication to amended answer was filed herein on the 4th day of February, 1887, and is hereto annexed.

Thereafter a final decree was filed and entered in the words and figures following, to wit:

87 *Decree.*

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et al.*, Defendants. } No. 3106.

This suit having been regularly commenced on the 23d day of July, 1883, and the defendants, Henry Curtner, J. West Martin, The Bank of California, a corporation; Alfred E. Whitaker, Samuel B. Martin, W. D. English, George G. Taylor, Anna T. Taylor, Henry F. Crane, Le Grand Morehouse, Andrew S. Barron, Garrison Gerst, Franz Leberier, Charles G. Johnston, Rasmus H. Carstenson, Frances Schweer, John Hinkle, Thomas W. Moore, John R. Deardorff, Margaret Armstrong, Patrick Armstrong, and F. S. Wensinger, having duly appeared and answered the amended bill of complaint herein, and the suit having been dismissed as to the other defendants, and the cause having been refer-ed to S. C. Houghton, Esq., examiner in chancery, to take and report the testimony to this court, and the testimony of the respective parties having been duly taken and reported accordingly, and afterwards the cause having been fully presented to the court and submitted for decision, and it satisfactorily appearing from the testimony, admissions, and agreed statement of facts that all the material allegations of the amended bill of

88 complaint were and are true:

Now, therefore, after due consideration and deliberation and on motion of counsel for complainants—

It is adjudged and decreed that the listings by the officers of the United States land department to the State of California of the lands mentioned in the amended bill of complaint and hereinafter particularly described and all of such listings and certifications were and each of them was made through error and mistake and without authority of law, and that the same were and are and each of them was and is null and void, and the same are and each of them hereby is adjudged and decreed to be null and void, and it is further decreed that no interest or title in said lands thereby passed to the State of California.

And it is further adjudged and decreed that the several patents issued by the State of California upon and in pursuance of the afore-

said listings and certifications of said lands to the State of California on, to wit, February 3, 1871; March 4, 1878; November 9, 1870; April 5, 1873; April 6, 1871; May 18, 1872, and November 29, 1871, respectively mentioned in the amended bill of complaint, so far as the same embrace or purport to convey the lands hereinafter described or any part thereof, were and are and each of them is null and void and conveyed no title to said lands or any part thereof, and the same are and each of them is hereby adjudged and decreed to be utterly null and void; and it is further adjudged and decreed that no title to or interest in said lands or any of them passed to said defendants or any of them by virtue of said patents or either
89 of them, and the said defendants and each and all of them, their grantees and successors in interest, are and each of them is forever enjoined and restrained from asserting or claiming in any way or from any right, title, or interest in or to said lands or any part thereof under or by virtue of said listings or certifications or any or either of them or under or by virtue of said patents or any or either of them.

And it is further adjudged and decreed that the title to said lands and every part and parcel thereof had, prior to the aforesaid listings and certifications, and prior to the issuance of said patents or any of them, passed to and vested in the Central Pacific Railroad Company under and by virtue of the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean," etc., approved July 1st, 1862, and acts amendatory thereof, and that the said Central Pacific Railroad Company is entitled to have and receive a patent of the United States for the said lands mentioned in the bill of complaint herein, and which are particularly described as follows, to wit: Section thirteen, the north half and southwest quarter of section fifteen, the east half of section twenty-one, the northeast quarter of section thirty-three, and section thirty-five, all in township two south of range one east, Mount Diablo base and merid-an; also lot fourteen, the southeast quarter of southwest quarter and the southwest quarter of the southeast quarter of section seventeen, the southeast quarter of the northeast quarter, the northeast quarter of the northeast quarter, lot four, the southwest quarter of the northeast quarter, lot
five, fractional southeast quarter of northwest quarter, lot
90 one, and lot seven of section nineteen, and the west half of section twenty-one, all in township three south of range three east of said base and merid-an, containing 2,867.10 acres of land, situate in the counties of Alameda and Contra Costa, State of California.

And it is further ordered, adjudged, and decreed that the complainants do not have or recover costs.

Done this 5th day of March, A. D. 1889.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered March 5th, 1889. L. S. B. Sawyer, clerk.

Certificate of Clerk.

Whereupon said pleadings, subpœna, copies of orders, and final decree are hereto annexed, said final decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, etc.: L. S. B. SAWYER, *Clerk*,
[SEAL.] By J. D. MONCKTON,
Deputy Clerk.

Endorsed: Enrolled papers. Filed March 5th, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

91 *Syllabus of Opinion.*

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE UNITED STATES OF AMERICA
vs.
HENRY CURTNER *et al.*
} No. 3106.

FEBRUARY 4TH, 1889.

Before Field, circuit justice, and Sawyer, circuit judge.

By the court—Sawyer, circuit judge.

Benjamin Harris Brewster, Attorney General of U. S. A.; S. G. Hilborn, U. S. district attorney; Shafter, Parker & Waterman and J. W. Harding, of counsel for complainant; H. F. Crane, L. D. Latimer, Rothschild & Baum, Mich. Mullany, Thos. D. Carneal, J. C. Martin, attorneys for respondents.

Opinion.

1. The congressional acts of 1862 and 1864, granting aid in the construction of a railroad and telegraph line to the Pacific Ocean, etc., operated as a present grant of land to the railroad company, upon conditions subsequent, which could only be defeated by breach of conditions and divesture of title thereupon by proper proceedings on behalf of the United States.
2. The lands granted were the odd-numbered sections within twenty miles of the line of the road, such as were public lands at the
92 date of the act, not sold, reserved, or otherwise disposed of by the United States, and also such odd-numbered sections within the same limits as were public lands to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed.
3. No right other than that of the railroad company could be acquired or initiated in any of said odd sections of land after filing in the local land office of the district, on January 30th, 1865, of the order of withdrawal provided for in sec. 7 of the act of July 1st, 1862.

4. The filing of the map of general route and the withdrawal thereupon protected the lands against the acquisition of any other right by any other parties until the line should become "definitely fixed," when the grant became specific by attaching itself to every odd section within the prescribed limits.
5. State selections of lien lands made upon lands unsurveyed by the United States are utterly void.
6. All the State selections shown in the bill being upon lands unsurveyed by the United States at the date of selection in township 2 south, 1 east, and 3 south, 3 east, Mt. Diablo B. and M., were therefore void.
7. Lands are not surveyed lands by the United States until a certified copy of the official plat of survey has been filed in the local land office.
8. The State selections in question were also void for the reason that the act of 1853, under which these selections were
93 made, excepted from selection by the State in lieu of school sections lost "lands reserved by competent authority" and "lands claimed under any foreign grant or title" and "mineral lands."
9. No right of any kind had attached to these lands when they were withdrawn for the purposes of the railroad grant, on January 30th, 1865, that under the recent decision of the U. S. Supreme Court in United States *v.* McLaughlin could prevent that grant from attaching. It was therefore the first grant to attach, and by performance of the conditions subsequent the title of the company became absolute.
10. The selections in question were excepted from the confirmation of the act of 1866; but had it been otherwise it was not in the power of Congress at that time to divest the right of the company.
11. The act of March 1st, 1877 (19 Stat., 267), for like reason cannot affect the rights of the railroad company. At the date of this confirmatory act, seven years afterwards, the United States had no interest whatever in the land upon which the act could operate.
12. Parties purchasing under State locations in township 2 south, 1 east, since June 10th, 1865, had official record notice of the right of the railroad company, for the map filed in the office of the register of the local land office had distinctly endorsed upon it in red ink the following, viz: "The odd-numbered sections on this plat are granted to the Western Pacific railroad."
13. The statute of limitations does not run against the United States, and the cause of action here was not stale, the
94 company having been from the first active in pursuing its right before the Department of the Interior.
14. The Government is not without interest in this action, being responsible to the company for the land or its full value by reason of the statutory grant and contract in the congressional acts of 1862 and 1864.

15. The Mexican grant, called Las Pocitas, was a float, a grant of two leagues within exterior boundaries embracing ten or more leagues, which two leagues so granted *was* confirmed and patented to the claimants and the odd-numbered sections outside of the two leagues granted and confirmed, but inside the exterior boundaries passed to the railroad company.
16. The prior decision, Newhall *vs.* Sanger, by the United States Supreme Court — materially limited in its operation by the recent decision in United States *vs.* McLaughlin.

Opinion.

By the court, SAWYER, circuit judge:

This is a bill in equity filed by the Attorney General on behalf of the United States at the request of the Secretary of the Interior to obtain a decree of the court vacating and annulling the listing over to the State of certain lands selected by the State in lieu of sections 16 and 36, as was supposed, in pursuance of the act of Congress on the subject adjudging such listing to be unauthorized and void, annulling and vacating the patents issued to purchasers by the State after such selecting and listing, and decreeing that no title to
95 the lands passed thereby to the patentees. The grounds of the bill are that the listing over to the State was by mistake and without authority of law, the lands having been granted to the Central Pacific Railroad Company before any right could have attached in favor of the State, and were therefore not subject to selection by the State under the said acts.

After a contest continued for many years the Secretary of the Interior has finally decided that the lands in question belong to the railroad company and that it is entitled to a patent; that they were listed to the State by mistake, without authority of law, and that the listing is void; but the Department refuses to complicate matters by issuing patents. According to the view of the Secretary of the Interior the United States are under obligation to convey a clear title to the railroad company, and they are unable to do so by reason of the mistake of the officers of the Government in unlawfully listing the lands to the State, and consequently it is the duty of the Government to have the prior listing to the State annulled and the patents issued thereon declared to be unauthorized and void by a decree of the court before issuing patents to the party entitled. For these reasons and upon these grounds this bill has been filed by the Attorney General at the request of the Secretary of the Interior.

The lands in question are odd sections lying within the twenty-mile limit of the grant of lands made to the Central Pacific Railroad Company to aid in the construction of its road by an act of Congress of July 1st, 1862, and the act of 1864, amending said act. 12 Stat., 492, sec. 3, and 13 Stat., 353, sec. 4.

96 Part of the lands lie in township 3 south, range 3 east, Mt. Diablo base and meridian, and a part in township 2 south, range 1 east.

The lands in township 3, range 3, were surveyed in the field in August, 1862, and sectionized, and a plat thereof was made and approved by the surveyor general of California December 24th, 1862, but a duly certified copy of the plat was not filed in the land office of the district till June 4th, 1869. The certified copy of the plat then filed is regarded by the Department as the official plat, and the date of its filing, June 4th, 1869, as the date of the survey. On December 28th, 1865, a plat of the township, approved by the surveyor general December 18, 1865, was filed in the district land office, but this plat is not regarded by the Department as official or as indicating the date of the official survey. (Complainant's Ex. 2.)

Township 2 south, range 1 east, was first surveyed in the field in March, 1865, and an approved plat thereof first filed in the district land office June 10, 1865.

In accordance with the provisions of said acts of 1862 and 1864 the railroad company filed in the Department of the Interior, on December 8th, 1864, its map designating the general route of the road, and on December 23d, 1864, the Secretary of the Interior, in pursuance of the provisions of said acts, issued an order withdrawing the said lands for the distance of twenty-five miles on each side of the line of said road so designated "from sale, location, pre-emption, and homestead."

97 A map showing distinctly the lands so withdrawn accompanied said order. Said order of withdrawal and map were received and filed in the district land office and went into effect, at latest, on January 30, 1865.

This action was before any of the lands in township 2, range 1, had been surveyed in the field and before any plat recognized by the Department as official of the lands surveyed in township 3, range 3, had been filed, but after this latter township had been actually surveyed in the field. The road having been fully completed and accepted by the President, the railroad company filed its map of definite location on February 1st, 1870.

In 1839 the Mexican Governor, Alvarado, made a grant of land called Las Pocitas to one Livermore and another, who prescribed it to the board of land commissioners for confirmation, and it was confirmed by the board February 14th, 1854.

The decree is in the words following, to wit: "The lands of which confirmation are hereby made of 'Las Pocitas' are bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less. Reference for further description to be had to the map marked C and filed in the cause."

The exterior boundaries contained from ten to twelve leagues.

98 The district court on appeal affirmed the decree of the board February 18, 1859, and the Supreme Court of the United States finally confirmed the grant on appeal in January, 1861. The final decree of confirmation is in the words following: "The land of which confirmation is hereby made is known as 'Las Pocitas'

and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then the less quantity is hereby confirmed. Reference for further description to be had to the map marked C filed in this case.

After confirmation by the board and before the appeal at the request of Livermore, then the owner of the grant, on April 5, 1854, Wm. J. Lewis, a deputy surveyor, was directed by the U. S. surveyor general of California to make a survey. He was directed to notify any adjoining claimants who might be interested of the time and place when the line would be run, to note any objections, and report any protest that might be made.

He made the survey in accordance with the instructions, Livermore being present and pointing out his corners and boundaries; and the deputy surveyor reported that the owner, Livermore, "expressed himself entirely satisfied with the boundaries as I surveyed them and as represented in the accompanying map." He
99 reports that he has no doubt that "the survey as made fulfills the intentions of the Mexican grant as derived from the terms of the grant."

The neighboring owners were notified and were also present with Livermore and pointed out their boundaries, and they, as well as Livermore, were satisfied. This survey was approved by the surveyor general June 19, 1854. It embraced over four—nearly five—square leagues of land, more than double the amount afterwards stated in the decree of confirmation by the Supreme Court, but did not include any of the lands now in controversy.

An appeal having afterwards been taken by the United States from the decree of confirmation, nothing further was done under this survey. The final decree of confirmation by the Supreme Court in January, 1861, limited the amount to two square leagues by striking out the words "more or less" in the decree of the board and adding other words indicating the purpose, the language of the final decree being "containing in all two square leagues, provided that quantity is contained within the boundaries named," etc. In 1858, pending the appeal, Livermore died. The claim having been finally confirmed in 1861, Mr. Dyer, a deputy surveyor, in 1865, under instructions dated September 21, 1865, made a survey which embraced ten square leagues instead of two, to which the quantity was limited by the terms of the final decree. This survey embraced the entire Lewis survey and extended far beyond it in nearly all directions, and especially to the southeast and northwest. It also em-
braced the lands in controversy in this suit at the two extrem-
100 ities of the survey in the longest direction of the survey. The survey was approved by the surveyor general of California on February 8th, 1867. On July 30, 1868, the Secretary of the Interior set aside this survey as being "clearly wrong," and directed the

Commissioner to return it to the "surveyor general with instructions to reduce the quantity of land to two square leagues." A new survey was made by Dyer, deputy surveyor, by which the land was reduced to two square leagues, all of which lies within the boundaries of the Lewis survey. Some of the lands in controversy are within the two square leagues or even within the boundaries of the Lewis survey. This last survey of two square leagues was approved by the surveyor general May 11, 1870, by the Commissioner of the General Land Office March 1, 1871, and by the acting Secretary of the Interior on June 6, 1871, by which it became final.

The land was patented in accordance with this survey and a patent accepted by the claimant.

Between May 15, 1863, and May 16th, 1864, after actual survey in the field, but before the survey had been officially adopted or recognized by the Secretary of the Interior, and before it had been approved by the surveyor general and filed in the district land office, the State of California, by its locating agent, made selections and locations of the lands now in controversy in township 3, range 3, in part satisfaction of the grant to the State of lands in lieu of sections 16 and 36, under the act of March 3rd, 1853. 10 Stat., 246, sects. 6 and 7.

101 Between February 17, 1864, and February 9th, 1866, the State had issued its certificates of purchase to the several purchasers thereof, the first payments of the purchase-money having been made.

The selections, apparently at their respective dates, were by the register of the land office entered in his office. A portion of these lands were certified over to the State by the land department at Washington, approved by the Secretary of the Interior on November 15th, 1871, and the remainder on March 24, 1873, and they were afterwards patented to the purchasers by the State.

The lands in controversy, situate in said township 2, range 1, were selected in advance of any survey in the field by the United States surveyor general, upon surveys made by the county surveyors of the State, between July 28, 1862, and July 20th, 1863. Certificates of sale were issued to purchasers by the State for a part between March 2, 1863, and January 25, 1864, and for the remainder between February 20 and March 14, 1865. These selections were entered by the register of the land office on June 12, 1865. A part was certified over to the State by the Secretary of the Interior on September 8, 1870, and the rest on March 11th, 1871.

These lands were also afterward patented to the purchasers by the State. The listings over to the State were all after the final approval of the two-square-league survey of the Rancho Las Pocitas, which was on June 6, 1871; also after the filing of the map of general location in December, 1864, and the withdrawal by the

102 Secretary of the Interior in January, 1865, as well as after the filing of the map of the definite location of Western Pacific Railroad Company on February 1, 1870; but the surveys and selections and issue of certificates of purchase by the State were before the said dates of June 6, 1871, and February 1, 1870.

The Western Pacific railroad was completed, in accordance with the terms of the several acts of Congress relating to the subject, on or before December 29th, 1869, and the company thereby became entitled to the lands granted. A contest thereupon immediately arose before the Department of the Interior between the railroad company and the settlers who settled subsequently to the grants on the odd sections as to what lands were included by the grant, and this was supposed to depend upon the exterior boundaries of the Las Pocitas grant.

This matter was earnestly litigated before the Department, a test case (Arthur St. Clair *vs.* The Western Pacific Railroad Company) having been made by stipulation with the settlers, until January, 1874, when it was decided in favor of the railroad company. Soon thereafter, on May 12th, 1874, the land agent of the company presented a list of lands for which the company claimed patents, including the lands in controversy, when it was discovered that the latter had been listed over to the State by mistake upon the State selections hereinbefore referred to as indemnity lands for losses of sections 16 and 36 granted for school purposes, and that they were claimed by purchasers from the State. The claim of the
103 company for patents to these lands was vigorously prosecuted by the company with varying results, until it was finally determined by the Secretary of the Interior, upon petition for reconsideration by the company, filed April 22d, 1880, that the company was entitled to the lands; but he declined to complicate matters by issuing patents until the question of right should be settled by the courts. Thereupon, and for the purpose of having the question authoritatively adjudicated, upon his request the bill in this case was filed by the Attorney General on July 23, 1883.

Upon the allegations of the bill a demurrer was interposed on the ground, among others, that the cause of action was barred by the statute of limitations; and if the statute of limitations does not run against the United States, then that the cause of action is stale, and it would be inequitable to enforce it at this late day. The demurrer was overruled, since the statute does not run against the United States, and the railroad company had, from the first, been active in pursuing its right before the Department.

The delay was entirely owing to the course of procedure in the Department and the large amount of other similar business incident to the administration of its affairs. (U. S. *v.* Curtner, 11 Saw., 411.)

Since the decision on the demurrer the Supreme Court has decided the case of United States *v.* Beebe (127 U. S., 338, and 8 Sup. Ct. "Reporter," 1086), in which it is held that after a lapse of 45 years a suit in the name of the United States to cancel a patent ob-
104 tained by fraud and in which the United States has no interest is barred, the suit being effected by the laches of those whose interests it asserts. The point is, therefore, now again made at the hearing and this case is relied on as determining the question. We do not think it reaches the case. There has certainly been no laches here on the part of the railroad company. It has been pressing its claim earnestly before the Department from the first,

and it could not go any faster than the business and course of procedure of the Department permitted. The company could not sue the Government. Besides we do not think the Government is wholly without interest. If these lands are within the statutory grant the company has earned them by a full performance of its part of the statutory contract, and an absolute indefeasable right to a patent unincumbered by any cloud has vested. The Government in that case is legally bound to make a good title. It is legally liable to perform its part of the contract and issue the patent as required by the statute. The United States are, therefore, responsible to the railroad company for the land or its full value. By the mistake of their officers they have put it out of their power to comply with their contract, and they are interested to the full value of the land in setting aside the listing and patents resulting from their mistakes or having them judicially adjudged inoperative and void in
105 order that they may relieve themselves from their liability. For these reasons we do not think the decision relied on reaches the case.

As we have seen from the facts stated, the lands in question are odd sections within the limits prescribed by the act of 1862 granting lands to aid the construction of the Western Pacific railroad. The Mexican grant called Las Pocitas was a float, a grant of two leagues within exterior boundaries, embracing ten or more leagues unlocated both at the date of the act of 1862 and at the times when the claims of the State to the land in question were initiated. After the rights of both parties—whatever they were—had attached this grant was finally located and patented so as to exclude the lands in controversy. There was then ample land to satisfy this float, both at the time of the passage of the act of 1862 and at the time when the right of the railroad company attached to the particular odd sections and became specific and indefeasible. In United States *vs.* McLaughlin, decided at the last term of the Supreme Court (127 U. S., 428, and 8 Sup. Court Reporter, 1177), it was held, after the most mature consideration, that in case of a floating Mexican grant of a specific quantity of land within large exterior bounds the land within such exterior boundaries are public lands, subject to a railroad grant, there being sufficient left to satisfy the float, and that the said act of 1862 took effect upon the odd sections of land within such exterior boundaries as were not finally required to satisfy
106 the float, thus very materially limiting the operation of the prior decision in Newhall *v.* Sanger. That is precisely this case, and the same act of 1862 granted to the same company all the odd sections within the exterior boundaries of the Las Pocitas grant embracing ten or more leagues within the prescribed limits and conditions, not required to satisfy the float of two leagues, which has since been finally located so as to exclude the lands in question. Under this decision, then, the railroad company, by the acts of 1862 and 1864, had a valid grant to every odd section of land within twenty miles on each side of the road and within the exterior bounds of the Las Pocitas grant, not embraced within the two leagues as it was finally located, "not sold, reserved, or otherwise disposed

of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." 12 Stat., 492, sec. 3.

The lands in question are odd sections within the prescribed limits, and are not embraced in the Las Pocitas grant as finally patented.

These lands, therefore, upon completion of the road, passed to the railroad company, unless some one of the rights specified in the statute had attached before the attaching of the right of the company.

Section 7 of the act provides that the "said company shall designate the general route of said road as near as may be and shall file a map of the same in the Department of the Interior; where-
107 upon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, or sale." (*Ib.*, 493.) This map of general location was filed in the office of the Secretary of the Interior on December 8th, 1864, and on December 23rd, 1864, the Secretary issued an order in pursuance of the acts of Congress, as they then were, withdrawing for twenty-five miles on each side of the designated line from sale, location, pre-emption, and homestead, and forwarded it, together with a map showing the location and lands withdrawn, to the register of the land office of the district embracing the lands, where it was received, filed, and promulgated on January 30, 1865, from which date at the latest no right other than that of the railroad company could be acquired or initiated in any of said odd sections of land.

If, then, no right of the kind specified by the statute had legally attached to the lands in question before the 30th of January, 1865, none could thereafter attach in favor of the State by selection, listing over by the land department, or otherwise, nor could Congress even authorize any subsequent legal transfer of title. The grant to the railroad company was a present grant upon conditions subsequent, which could only be defeated by breach of condition and its divesture of title thereupon by proper legal proceedings on behalf of the United States.

The filing of the map of the general route and withdrawal thereupon from sale, pre-emption, etc., protected the lands against the acquisition of any other right by any other parties until the line should become "definitely fixed," when the grant would be-
108 come specific by attaching itself to every odd section within the prescribed limits, and could not thereafter be changed.

(United States *v.* McLaughlin, 12 Saw., 191, 202; Buttz *v.* N. P. R. R. Co., 119 U. S., 55; S. P. R. Co. *v.* Orton, 6 Saw., 198, & cases there cited; Denny *v.* Dodson, 32 Fed. Rep., 899; Schulenberg *v.* Harriman, 21 Wall., 44; M. & R. A. Co. *vs.* K. P. & T. R. Co., 97 U. S., 521.)

The only remaining question, therefore, is: Had any such right as is excepted by the statute legally attached in favor of the State in the lands in question or any of them on January 30th, 1865?

It is not pretended that any other right than that under the State selection had attached.

It has been settled by numerous decisions in the State of California, and affirmed by the U. S. Supreme Court, that the State could acquire no right whatever by a selection of lieu lands made before the lands have been surveyed by the United States, and that a selection made upon unsurveyed lands is utterly void. Grogan *v.* Knight, 27 Cal., 516; C. P. R. R. Co. *v.* Robinson, 49 Cal., 446, 448; Chant *v.* Reynolds, 49 Cal., 217; Young *v.* Shinn, 48 Cal., 26; Hastings *v.* Devlin, 4 Cal., 358; Toland *v.* Mandell, 38 Cal., 31, 41; Aurrecoechea *v.* Sinclair, 60 Cal., 549; Collins *vs.* Bartlett, 44 Cal., 371, 380; Smith *v.* Athern, 34 Cal.; Aurrecoechea *v.* Bangs, 114 U. S., 383; Bernard's Heirs *v.* Ashley's Heirs, 18 How., 46. None of the lands in question situate in township two south, range 1 east, as we have seen, were surveyed in the field by authority of the United States till the month of March, 1865, and the approved plats were not filed in the district land office till June 10, 1865. The applications of the State locating agent to locate all said lands in
109 township 2 south were made and entered in the office of the land office on the 12th and 13th of June, 1865, the register having refused applications made in 1862 and 1863 upon surveys made under authority of the State. As we have seen, the acts of the State in making selections prior to the United States survey, in March, 1865, and the filing of the plat in the land office in June, were utterly void, and no rights attached to the lands or any of them by virtue of those acts performed before said survey in March. On January 30th at latest the grant to the railroad company attached in such manner that it could not be thereafter limited or divested, and the absolute right to the lands by the completion of the road and filing the map of definite location indefeasibly vested in the company. There can be no doubt therefore that the complainants should have a decree that they are entitled to the lands in said township 2 south.

The lands in question lying in township 3 south stand in no different situation from those in township 2 south, except that they were surveyed in the field by the United States deputy surveyor in August, 1862, and a plat thereof was made and approved by the surveyor general on December 24, 1862; but a certified copy was not filed in the office of the register of the land office of the district embracing the lands until June 4, 1869. This plat (so filed in 1869) is regarded by the Interior Department as official and the survey as made of the date of filing. A plat approved by the surveyor general December 18, 1865, however, was filed in the district land office on December 28th, 1865, this being the first plat filed in that
110 office; but this map is not regarded by the Interior Department as official, as it had not at that time been approved and adopted by the Department. Were it otherwise this filing was too late.

Unless the actual survey in the field and making and approving a plat by the surveyor general without filing it or a certified copy of it in the local land office places the lands in the category of surveyed lands in contemplation of law, then these lands were also selected before they were surveyed by the United States and the selections

were void. The Interior Department did not regard the survey as official until the certified copy of the official plat was filed, by direction of the Department, in the local land office June 4th, 1869. Whether this is to be regarded as the date of the survey or not, we are satisfied that the lands could not be regarded as legally surveyed in such sense as to open them to selection, location, sale, or other disposition till the approved copy of the plat was filed, on December 28, 1865. This is the earliest date at which they could be considered open to selection, if open to selection then.

The land office was the place for the disposition and record of the public lands, and until they had an authentic official plat of the surveys of the public land it would be impracticable to keep a record of them or of their disposition.

If we are correct in this view, then no valid selection could be made at the earliest till December 28th, 1865, and this was several months after the grant to the railroad company had indefeasibly attached.

On another ground the State selections in question are
111 clearly void and no interest attached to the lands selected in favor of the State. By the express terms of the act of 1853, under which the selections were made, "lands reserved by competent authority," "lands claimed under any foreign grant or title, and the mineral lands" are excepted from the operation of the act. Consequently neither such "reserved lands," lands claimed under Mexican grants, nor mineral lands could be legally selected in lieu of school sections lost or otherwise disposed of; and this was manifestly the view of Congress, for when it passed the act of 1866 to quiet titles in California by confirming void selections it also excepted from confirmation "any land held or claimed under any valid Mexican or Spanish grant." 14 Stat., 218, sec. 1. That selections of lands so claimed under Spanish grants were void and created no right whatever in the State is directly decided an- settled by the Supreme Court of the United States in cases arising under this very grant, Las Pocitas, upon locations made in 1863 at the same time and in the same manner as the lands now in question were selected and located. Aurrecorchea *v.* Bangs, 114 U. S., 382, and Huff *v.* Doyle, 93 U. S., 553.

These cases are controlling. The lands were claimed under the Las Pocitas grant at the time of their selection, location, and sale by the State, and they were afterwards in fact included in one of
112 the surveys upon the final decree of confirmation, but that survey was set aside, and they were finally excluded by the survey which became final in the year 1871. The Supreme Court held that no valid selection could be made by the State until the grant was finally located. No right of any kind then had attached to these lands when they were withdrawn for the purposes of the railroad grant, on January 30th, 1865; that, under the recent decision of the Supreme court in the United States *v.* McLaughlin, nothing could prevent that grant from attaching. It was therefore the first grant to attach, and by performance of the conditions subsequent the title of the company became absolute. The selections in ques-

tions were excepted from confirmation by the act of 1866; but had it been otherwise, as we have seen, it was not in the power of Congress at that time to divest the right of the company.

The act of March 1, 1877 (19 Stat., 269), for like reasons cannot affect the rights of the railroad company. The right of the company had not only attached, but by the performance of the required conditions within the prescribed time and of the filing of the map of definite location the grant had become specific on February 1st, 1870, and the title of the company had become absolute and indefeasible. At the date of this confirmatory act, therefore, seven years afterwards, the United States had no interest whatever in the land upon which the act could operate.

113 This case affords another instance of hardship arising from the ill-advised efforts of the State to prematurely select the lands to which it was entitled without regard to the existing laws of the United States; but with respect to the particular lands now in question the parties purchasing in township 2 south, 1 east, since June 10th, 1865, had official record notice of the right of the railroad company, for the map filed in the office of the register of the land office had distinctly endorsed upon it in red ink the following: "The odd-numbered sections on this plat are granted to the Western Pacific railroad. See letter of instructions, dated December 23rd, 1864."

It follows from these views that there must be a decree in favor of the United States adjudging that the listing to the State of the lands in controversy was unauthorized and void, and that the patents issued by the State upon such listing to purchasers from her passed no title to them in the lands patented and enjoining them from claiming in any way or form title to such lands or to any part of them under the said patents, and that the title to the lands passed to the Central Pacific Railroad Company by the acts of Congress of July 1st, 1862, and of July 2nd, 1864, the said company having complied with the conditions of the grant to it and constructed the road and telegraph line designated therein, and that the said company is entitled to a patent of the United States for such lands. No costs will be allowed to the complainants.

February 4th, 1889.

SAWYER, *Circuit Judge.*

I concur.

FIELD, *Circuit Justice.*

Endorsed: Read in open court February 4, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

114 *Caption to Depositions.*

In the Circuit Court of the United States for the Ninth Judicial Circuit in and for the District of California.

UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et al.*, Respondents. } In Equity. No. 3106.

Be it remembered that on the first day of December, A. D. 1886 and on the several days thereafter to which the examination was regularly adjourned, as hereinafter set forth, at my office, room 57, in the United States Appraisers' building, on the northeast corner of Washington and Sansome streets, in the city and county of San Francisco, State of California, before me, S. C. Houghton, examiner in chancery of the circuit court of the United States for the ninth circuit and district of California, personally appeared the several witnesses whose names are hereinafter set forth, who were produced and examined on behalf of the respective parties to the above-entitled cause.

F. H. Waterman, Esq., and J. W. Harding, Esq., appeared as counsel on behalf of complainant, and H. F. Crane, Esq., M. Mullany, Esq., and J. C. Martin, Esq., as counsel on behalf of respondent-.

Following *in* a record of the proceedings:

WEDNESDAY, *December 1st*, 1886.

Present: Mr. Waterman and Mr. Harding, of counsel for
115 complainant; Mr. Crane and Mr. Martin, of counsel for respondents.

Stipulation Extending Time to Take Testimony.

It is stipulated and agreed by and between the respective parties herein that the time within which testimony may be taken in this case is extended to and including the 20th inst.

Stipulation that Testimony be Taken Down in Short-hand.

It is in like manner stipulated, that the testimony herein may be taken down in short-hand writing and transcribed by a reporter appointed by the examiner, and that such transcript shall be received in evidence, subject to no objections except such as could be urged where the testimony — taken by the examiner personally and in long-hand writing, and that a charge of ten dollars per day may be made for the attendance of said reporter, which shall be taxable as costs in this case.

(Examination continued, pursuant to agreement of counsel, until Saturday, the 6th instant, at half past ten o'clock a. m.)

SATURDAY, *December 6th*, 1886.

Present: Mr. Waterman and Mr. Harding, of counsel for complainant; Mr. Crane and Mr. Martin — Mr. Mullany, of counsel for respondents.

Introduction of Exhibits in Evidence.

Complainant introduces in evidence the printed document entitled No. 3106, in the circuit court of the United States, ninth circuit, district of California, The United States of America, complainant, *vs.* Henry Curtner *et als.*, defendants, "admission of allegations of amended bill." Marked "Complainant's Exhibit A."

Complainant introduces in evidence copy, duly certified by
116 the Commissioner of the General Land Office of the United States, of a map entitled "Map of the line of the Western Division of the Central Pacific Railroad Company of California from Sacramento to San Francisco," which map bears on its face the following certificate:

116 "UNITED STATES OF AMERICA, }
State of California. }

OFFICE OF THE CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA.

We, the undersigned, the president, secretary, & acting chief engineer of said company, do hereby certify that this is a true and complete map of the line & route of the Western Division of said company's road and telegraph line, from the city of Sacramento to the city of San Francisco, and the western terminus thereof, as adopted, located, designated, and fixed by the board of directors of said company, a copy of which is on file in the office of said company, in the city of Sacramento.

Witness our hands and the corporate seal of said company, hereto affixed, by order of said board of directors, this fifth (5th) day of October, A. D. 1864.

LELAND STANFORD, *President.*
[SEAL.] E. H. MILLER, JR., *Secretary.*
SAM. S. MONTAGUE,
Acting Chief Engineer."

Also endorsed: "Received at the Gen. Land Office Dec. 8th, 1864, with letter from Geo. C. Gorham, agent, dated Dec. 7th, 1864," with the certificate of the Commissioner of the General Land Office
117 of the United States attached to said map, from which it appears that the original of said map was filed in said office Dec. 8th, 1864. Marked Complainant's Exhibit "B."

Stipulation as to Complainant's Map, Exhibit B, &c.

It is admitted by both complainant and respondents herein that a copy of the map, "Exhibit B," was caused to be filed in the office

of the secretary of state of the State of California by the Central Pacific Railroad Company of California on the 10th day of January, 1865, and that another copy of said map was caused to be filed in said office of the secretary of State of California by the Western Pacific Railroad Company on the 11th day of January, 1865, and that another copy of said map was filed by the Western Pacific Railroad Company in the office of the county clerk of Alameda county on the 12th day of January, 1865.

It is further in like manner stipulated in like manner and agreed that either complainant or respondents may at any time before the testimony herein is closed introduce in evidence a copy of the field-notes on which said map was made.

Complainant also introduces in evidence a copy, duly certified by the Commissioner of the General Land Office of the United States, of the document endorsed "Com'r's letter of Dec'r 23, 1864, transmitting map to R. & R. at San Francisco and ordering withdrawal of lands of Cen. Pac. R. R. Co.," which document bears date Dec. 23rd, 1864. Marked "Complainant's Exhibit C."

Stipulation as to Exhibit C and Map, Exhibit D.

Complainant also introduces in evidence copy, duly certified by the Commissioner of the General Land Office of the United States, of so much of an original map on file in said office as shows
118 the lands withdrawn in the San Francisco district, California, by letter of Dec. 23d, 1864, for the Central Pacific Railroad Company, said map being map accompanying and refer-ed to in the letter "Exhibit C." Marked Complainant's "Exhibit D." (It is admitted by both complainant and respondents that the letter, "Exhibit C," with the accompanying map, "Exhibit D," were received and filed in the office of the register and receiver in the United States land office at San Francisco, California, on the 30th day of January, 1865.)

Introduction of Exhibits in Evidence.

Complainant also introduces in evidence copy, duly certified by the Commissioner of the General Land Office of the United States, of an abstract copy of list No. 18, on file in said office, of State indemnity school selections of lands in San Francisco district, California, approved September 8th, 1870, which list purports to embrace a portion of the lands described in the complainant's bill here, and which certified list bears the following certificate:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Sept.* 8, 1870.

It is hereby certified that the tracts in this list are embraced in the original lists now on file in this office of lands selected in the San Francisco district, State of California, as indemnity for deficiencies in the township named, which indemnity school selections are authorized in the above-cited act of Congress of March 3, 1853, Feb-

ruary 26, 1859, and July 23d, 1866. It is further certified that the said tracts have been examined and compared with the township plats and tract books of this office, and that the indemnity is properly due to the townships for which selected, are found to be subject to selection and free from conflict; and it is therefore recom-
119 mended that the list be approved, subject to any valid interfering rights which may have existed at the date of selection.

JOS. S. WILSON,
Commissioner.

Also the following certificate:

"DEPARTMENT OF THE INTERIOR, *8th of Sept.*, 1870.

The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

J. D. COX, *Secretary.*"

Marked Complainant's Exhibit "E."

Complainant also introduces in evidence copy, duly certified by the Commissioner of the General Land Office of the United States, of abstract copy of list No. 20, on file in said office, of State indemnity school selections of lands in the San Francisco district, California, approved March 11, 1871, which documents contain similar certificates as those on the document "Exhibit E." Marked "Complainant's Exhibit F."

Complainant also introduces in evidence copy, duly certified by the Commissioner of the General Land Office of the United States, of similar abstract copy of list No. 23, on file in said office, of State indemnity school selections of lands in the San Francisco district, California, approved November 15th, 1871, which lists contain similar certificates to those appearing in "Exhibits E and F." Marked "Complainant's Exhibit G."

Complainant also introduces in evidence like certified copy
120 of similar list No. 25, and approved March 24, 1873, which certified list contains similar certificates to those appearing in "Exhibits E, F, and G" (marked "Complainant's Exhibit H").

The lands described in the four lists last above referred to include the lands in controversy in this suit.

Complainant also introduces in evidence copy, duly certified by the Commissioner of the General Land Office of the United States, — list of selections of lands in the San Francisco district, California, made May 12, 1874, by Charles J. Torbet, deputy land agent of the Central Pacific Railroad Company, which list embraces the lands, among other lands, described in the bill, together with the certificates thereto attached (marked Complainant's Exhibit I).

Mr. MULLANY: To that document I will make an objection. We object to the document on the ground that it is incompetent, irrevelant, and immaterial to this suit.

Complainant also introduces in evidence copy, duly certified by the said register of San Francisco land office, of a communication from the register of the land office of San Francisco district, California, to the honorable Commissioner of the General Land Office,

dated June 3rd, 1874, transmitting list No. 13 (Exhibit I) of lands selected by the Central Pacific Railroad Company, successors by consolidation of the Western Pacific Railroad Company, to the Commissioner of the General Land Office, and also the appeal of Tully R. Wise on the part of said railroad company from the refusal of the register to certify said list (marked Complainant's Exhibit J).

Mr. MULLANY: I object to the introduction of that paper
121 on the ground of its incompetency, irrevelancy, and immateriality; and, further, that this document is incomplete, as there is refer-ed to therein a document which is not produced, to wit, the certificate of the register and receiver mentioned therein.

Complainant also introduces in evidence copy, duly certified by the Commissioner of the General Land Office, of letter addressed to *to* the register and receiver at San Francisco, California, dated March 9th, 1878.

(Marked Complainant's Exhibit K.)

Complainant also introduces in evidence copy, duly certified by the Commissioner of the General Land Office, of a document which forms a part of the record on appeal from the decision of the Commissioner of the General Land Office, "Exhibit K," and which is in the following words, to wit:

"SAN FRANCISCO, CAL., *May* 25, 1878.

Hon. J. A. Williamson, Commissioner of Gen'l Land Office, Washington, D. C.

DEAR SIR: I appeal from the decision of the Commissioner of the General Land Office of the United States, at Washington, in decision 'F' of March 9th, 1878." * * *

Which document is signed "Yours respectfully, Wm. D. English, on behalf of himself and co-owners on the title to State of California to said lands involved in this matter and as one of the attorneys for the State of California in this matter."

Mr. HARDING: I offer that solely for the purpose of showing that an appeal was taken from the decision embodied in "Exhibit K."

Mr. CRANE: We insist that if the document is introduced
122 in evidence for that purpose that the notice shall be read in full.

Mr. HARDING: To which complainant objects.

Mr. CRANE: On the part of the respondents it is asked that the whole document referred to shall be read.

Mr. MULLANY: That is the document from which complainant's counsel has merely stated a few preliminary words and which are directly and expressly connected with and coupled up with the balance of the document, between the words which he has used, and that there is no such document offered as that which the counsel for complainant has stated, the portion he having thus stated being only a small portion of the document from which it is taken.

Mr. HARDING: I object to reading the entire document on the ground that it is utterly and entirely irrevelant to any issue involved in this suit, and the document is only offered for the purpose of

showing that an appeal was taken from the decision embraced in "Exhibit K," which fact is sufficiently shown by that portion of the document which has been read.

Mr. MULLANY: We object to the document in the whole on the ground that it is incompetent, irrevelant, and immaterial, and we object to that portion of it which has been read by counsel for complainant because he has not read the whole.

Mr. HARDING: There is no portion of the document referred to which is relevant or in any manner pertinent to this case, except that portion which I have read, in my opinion. As the remainder of the document is entirely devoted to a statement of the grounds upon which the appeal is taken, I decline to introduce any
123 portion of the document, except that which I have read, and protest against having it read, because it simply lumbers up the record with immaterial matter.

The EXAMINER: Under the objection from respondents that only part of the document referred to has been introduced, in my opinion the better cours- would be for complainant's counsel to read the entire document.

(The entire document was then read by counsel for respondents as follows:)

Before U. S. Land Office, San Francisco, May 25th, 1878.

In the Matter of the Application of the C. P. R. R. Co., suc'rs by con'n to W. P. R. R. Co., to select certain odd-numbered sections in T. 2 S., R. 1 E., M. D. M.

Appeal by State of California from Com'r'- decision of March 9th, 1878, "F," in the matter of the above-described application.

SAN FRANCISCO, CAL., *May 25th*, 1878.

Hon. J. A. Williamson, Commissioner of Gen'l Land Office, Washington, D. C.:

DEAR SIR: I appeal from the decision of the Commissioner of the General Land Office of the United States, at Washington, in decision "F" of March 9th, 1878, in relation to the "Lewis survey" of Rancho Los Pocitas," on the following grounds, to wit: That you have erred in deciding that the "Lewis survey" is the exterior boundaries of said Rancho "Las Pocitas." Said "Lewis survey" does not reach or extend to the north boundary, the "Lomas de las Cuevas," within two miles. It does not reach or extend to the east boundary, the Sierra de Buenos Ayres, by at least three miles. It does not reach or extend to the rancho of Don Jose Dolores Pacheco,
124 the boundary on the west, by several miles.

The said "Lewis survey" does not conform to the decree of the United States district court for the northern district of California, which fixes the boundaries of said "Las Pocitas." The following is a copy of said decree:

The land of which confirmation is hereby made is known as "Las Pocitas," and is bounded and described as follows, to wit: On the

north by the Lomas de las Cuevas, on the east by the "Sierra de Buenos Ayres," on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the boundaries named, and if less than that quantity be contained therein, then that less quantity is hereby confirmed.

Yours, respectfully, WM. D. ENGLISH,

On Behalf of Himself and Co-owners of the Title to State of California to said Lands Involved in this Matter and as One of the Attorneys for the State of California in This Matter.

Endorsed: "Land office, San Francisco, Cal. In the matter of the application of C. P. R. R. Co. to select lands in T. 2 S., R. 1 E., now listed to State of Cal. Appeal by State from decision of Mar. 9, 1878, "F." Filed May 25, 1878. W. R. W. Roy M."

Mr. HARDING: Complainant also introduces in evidence copy, certified by the register of the United States land office at San
125 Francisco, of letter from the register to the Commissioner of the General Land Office, which reads as follows:

"U. S. LAND OFFICE,
SAN FRANCISCO, CAL., *May* 29, 1878.

Hon. J. A. Williamson, Com'r Gen'l Land Office.

SIR: On the 9th March last, "F," your office decided in favor of the C. P. R. R. Co., suc'r, etc., to W. P. R. R. Co., in the matter of the application of said Co. to obtain a patent to certain odd-numbered sections in T. 2 S., R. 1 E., M. D. M., now listed to the State of California.

On the 25th inst. the State filed an application for a rehearing in said matter, and the same is forwarded herewith.

Very respectfully, WM. R. WHEATON, *Register.*"

("Marked Complainant's Exhibit L.")

Complainant also introduces in evidence copy, duly certified by the register of the United States land office at San Francisco, of letter of said register to the Commissioner of the General Land Office, which reads as follows:

"U. S. LAND OFFICE,
SAN FRANCISCO, CAL., *May* 29, 1878.

Hon. J. A. Williamson, Com'r General Land Office.

SIR: I forward herewith appeal (filed on 25th inst.) by State of California from your decision of 9th March last, "F," in the matter of the application of the C. P. R. R. Co., suc'r, etc., to W. P. R. R. Co., to select certain land in T. 2 S., R. 1 E., M. D. M. The State authorities request that action on this appeal be delayed until their application for a rehearing (which I forward this day) is disposed of.

Very respectfully, WM. R. WHEATON, *Register.*"

(Marked Exhibit "M.")

126 Mr. MULLANY: We object to this document, and also to last "Exhibit L," on the ground that they are incompetent, irrevelant, and immaterial to any issue in this suit.

Complainant also introduces in evidence copy, duly certified as correct by the register of the United States land office at San Francisco, Cal., of a communication, dated "San Francisco, Cal., March 18, 1879," addressed to the Hon. J. A. Williamson, Commissioner of the General Land Office, and signed by Charles H. Chamberlain, receiver, being notice to the Commissioner of the Land Office of demand of State of California to surrender list and title to certain lands and notice of appeal.

Marked "Complainant's Exhibit N."

Mr. MULLANY: We object to the introduction of this paper in evidence on the ground that it is incompetent, irrevelant, and immaterial, and that it has not been shown that the State had any interest in these lands at the time it bears date.

Complainant also introduces in evidence copy, duly certified by the Commissioner of the General Land Office, of a document purporting to be a decision addressed to the register and receiver of the San Francisco land office and dated October 18, 1878, declining to reconsider his decision of March 9, 1878, as set forth in "Exhibit K."

Marked "Complainant's Exhibit O."

Mr. MULLANY: I object to the introduction of that paper on the ground that it is incompetent, immaterial, and irrevelant to any issue in this suit.

Complainant also introduces in evidence copy, duly certified by the Commissioner of the General Land Office, of a decision,
127 of date June 26, 1879, addressed to the Commissioner of the General Land Office, by C. Schurz, Secretary of the Interior, and purporting to affirm the decision of the honorable Commissioner of March 9th, 1878, being "Exhibit K."

(Marked "Complainant's Exhibit P.")

Mr. CRANE: We interpose the same objection to this exhibit as that interposed to "Exhibit O."

Complainant also introduces in evidence copy, duly certified by the register of the United States land office at San Francisco, of a communication and decision from the Secretary of the Interior to the Commissioner of the General Land Office, dated January 15th, 1878, in the case of the State of California *vs.* M. D. Townsend and others and the Western Pacific Railroad Company, involving the right to certain lands in township three south, range three east, and the letter of the honorable Commissioner addressed to the register and receiver of the San Francisco land office, under date of January 24th, 1878, transmitting said decision.

(Marked "Complainant's Exhibit Q.")

Mr. MULLANY: We object to this document being put in evidence on the ground of its incompetency, irrevelancy, and immateriality, and that it has not been shown and cannot be shown that any of the parties to the present suit were parties to or had any knowledge or

opportunity to be heard in any of the matters to which this decision relates or pertains.

Complainant also introduces in evidence certified copy from the office of the Secretary of the Interior of a letter or communica-
128 tion, dated October 18th, 1882, addressed to the Commissioner of the General Land Office by the Secretary of the Interior, H. M. Teller, relating to the patenting to the Central Pacific Railroad Company of the lands embraced in this suit. (Marked "Complainant's Exhibit R.") Objected to by respondents as incompetent, immaterial, and irrelevant.

Examination continued until Wednesday, the 8th inst., at half past ten o'clock a. m.

FRIDAY, *February 18th*, 1887.

Present: Mr. Waterman and Mr. Harding, of counsel for complainant; Mr. Crane and Mr. Mullany, of counsel for respondents.

Complainant introduces in evidence "articles of agreement made this 8th day of June, 1867, by and between Charles McLaughlin, of the first part; William B. Carr, of the second part; Leland Stanford, Mark Hopkins, C. P. Huntington, Charles Crocker, and Edwin B. Crocker, parties of the third part, and the Western Pacific Railroad Company, party of the fourth part," and especially the eleventh article, which shows that the railroad company covenanted and agreed to dispose of thirty sections of the lands granted by said company to one William B. Carr. Marked "Complainant's Exhibit S."

(By agreement of counsel for the respective parties herein the said original articles are withdrawn and a copy thereof substituted.)

Mr. MULLANY: We enter an objection as to the admissibility of that document, "Exhibit S," on the ground that it is incom-
129 petent, irrelevant, and immaterial in this suit or pertaining to any issue in this suit.

Mr. HARDING: Complainant introduces in evidence in connection with the last exhibit introduced articles of agreement made on the 8th day of June, 1867, between Charles McLaughlin, William B. Carr, and Leland Stanford, whereby William B. Carr transferred to Leland Stanford his interest in the thirty sections of land mentioned in "Exhibit S" (marked "Complainant's Exhibit T").

(By agreement of counsel for the respective parties herein the said original articles of agreement are withdrawn and a copy thereof substituted.)

Mr. CRANE: Respondents object to the introduction of "Exhibit T" on the ground that it is irrelevant and immaterial.

Mr. HARDING: Complainant introduces in evidence, in connection with the last two documents introduced, namely, Exhibits S and T, a document dated San Francisco, July 13th, 1867, being a selection of the lands by Leland Stanford under and in pursuance of covenants contained in "Exhibit T," and also the acceptance of service

thereof by the Western Pacific Railroad Company and Charles McLaughlin, following said selections, and dated July 15th, 1867 (marked "Complainant's Exhibit U.").

(By agreement of counsel for the respective parties herein the original document last above referred to is withdrawn and a copy thereof substituted.)

Mr. MULLANY: We make the same objection to the introduction of the last exhibit as that interposed to "Exhibit S" by myself, and also as that interposed by Mr. Crane to "Exhibit T."

Mr. HARDING: Complainant next introduces in evidence
130 copy, duly certified by the register of the United States land office of San Francisco, of township plat of township No. two south, range one east, Mount Diablo merid-an, filed in United States land office at San Francisco June 10th, 1865, together with all the endorsements thereon. Marked "Complainant's Exhibit V."

Mr. CRANE: We object to the endorsement as being immaterial and irrelevant.

Mr. MULLANY: We object to the introduction of this document on the ground that it is incompetent, irrelevant, and immaterial, and on the ground in particular to that portion of writing on its face which is in the following words: "The odd-numbered sections on this plat are granted to the Western Pacific railroad; see letter of instructions, dated Dec. 23, 1864," on the ground that the said words are not authenticated nor signed by any officer or person, and that they are written on the face of this document in different ink from that of the other writings on its face, and that they are written there without authority of law or without any authentication whatever.

Mr. HARDING: Complainant next introduces in evidence like certified copy of township plat of township three south, range three east, Mount Diablo merid-an, filed in the United States land office at San Francisco June 4th, 1869, together with the endorsements on said plat. Marked "Complainant's Exhibit W."

Mr. MULLANY: We object on the ground that it is incompetent, irre*vel*ant, and immaterial.

Mr. HARDING: Complainant next introduces in evidence like certified copy of an endorsement on township plat of township
131 three south, range three east, of the withdrawal for railroad purposes of land in that township, which endorsement reads as follows: "The odd-numbered sections on this plat are granted to the Western Pacific Railroad Company; see letter of instructions dated Dec. 23, 1864." Marked "Complainant's Exhibit X."

Mr. MULLANY: We object to that "Exhibit X" on the ground that it is irrelevant and immaterial; and, further, that it is unintelligible and uncertain, and the portion thereof being in red ink is not authorized and not signed by any officer or person who is constituted or authorized by law to write the same or to order according to its contents.

(Complainant rests.)

Mr. CRANE: On behalf of the defendants claiming an interest in lands involved in this suit in township three south, range three east, Mount Diablo merid-an, I introduce in evidence copy of township plat of township three south, range three east, Mount Diablo merid-an, certified by the United States surveyor general for California, showing that said township was surveyed in the field, sectionized and subdivided into sections and quarter sections by the surveyor general of the United States in and prior to the month of August, 1862; that the township plat made from the field-notes of said survey, together with said survey and field-notes, was approved by said surveyor general on the 24th day of December, 1862; that said plat was amended in or about 1869 by delineating thereon the boundaries of lot 37, and as amended again approved June 26th, 1871. Marked "Respondents' Exhibit 1."

Mr. HARDING: Complainant objects to the document on
132 the ground that it is not official; that it never was filed in the local land office; that it has been adjudged by the Department of the Interior of the United States to be not official in "Complainant's Exhibit Q," in evidence in this cause.

Mr. CRANE: The defendants in said township next introduce in evidence an agreed statement of facts relative to that portion of the lands in controversy situate in township three south, range three east, Mount Diablo merid-an.

This statement shows in each case—

First. The fact and date of application to purchase, the name of the applicant, the description of the land sought to be purchased, and the character of the selection.

Second. The fact and date of the entry of such selection by the register of the United States land office in Tract Book No. 10, in the United States land office at San Francisco.

Third. The certification of the State locating agent of the selection and location of the land.

Fourth. The date and fact of the approval of the selection and location by the State surveyor general and the issuance to the purchaser of the certificate of purchase to the land.

Fifth. The fact and date of issuance of patent and the names of the present holders of said title.

Sixth. The fact that in all of those proceedings the lands were treated as surveyed lands.

(Marked "Respondents' Exhibit 2.")

Mr. HARDING: Complainant objects to counsel's statement of the contents of the document.

Complainant objects to the document on the ground that it
133 is incompetent; that the questions raised in that document are *res judicata*, all having been passed upon by the Department of the Interior, and, the selections specified therein having been adjudged void, the questions are therefore *res judicata*.

Complainant admits, however, that the printed paper introduced is a true copy of the written original signed by counsel.

Mr. CRANE: The same defendants now introduce in evidence a

copy of the certificate of purchase issued by the State of California to M. D. Townsend under date of February 17th, 1864, certified by the register of the State land office, for the purpose of showing that on the 25th day of January, 1864, said Townsend paid to the State one hundred & twelve dollars, being twenty per cent. of the purchase price & one year's interest in advance on the balance due the State for a part of the land in controversy, being the same land referred to in the agreed statement of facts, "Respondents' Exhibit 2," and also for the purpose of showing by the indorsement hereon that he afterwards paid to the State $565.45, the balance of the purchase price and interest, and also for the purpose of showing that said certificate of purchase appears on its face to have been issued for surveyed lands ("marked Respondents' Exhibit 3").

Mr. HARDING: Complainant objects, first, to counsel's construction of the instrument; second, that it is irrelevant, incompetent, and immaterial, it being incompetent in this, that said selections have been adjudged void by the Department of the Interior as being made from unsurveyed land, and that the question is *res judicatum*.

Mr. CRANE: We next introduce in evidence a copy of the certificate of purchase issued by the State of California to A. B. Winegar, under date of July 9th, 1864, certified by the register of the State land office, showing, as we claim, that on the 10th day of
134 April, 1864, said Winegar paid to the State one hundred and twelve dollars, being twenty per cent. of the purchase price & one year's interest in advance on the balance due the State for a part of the land in controversy, being the same land referred to in the agreed statement of facts, "Respondents' Exhibit 2," and further showing, as we claim, that it appears by the indorsement on said certificate that he paid the balance of the purchase price in full for the land, and that it shows, as we claim, that it was for surveyed land (marked Respondents' Exhibit 4).

Mr. HARDING: Complainant makes the same objection to this document as that interposed to the last, "Respondents' Exhibit 3."

Mr. CRANE: We next introduce in evidence a copy of the certificate of purchase issued by the State of California to George W. Dam, under date of February 22nd, 1864, certified by the register of the State land office, showing, as we claim, that on the 26th of January, 1864, said George W. Dam paid to the State one hundred and twelve dollars, being twenty per cent. of the purchase price and one year's interest in advance on the balance due the State for a part of the land in controversy, being the same land referred to in the agreed statement of facts, "Respondents' Exhibit 2," and also that it appears by the indorsements that he afterward paid to the State the purchase price for the land in full, and that it further appears that it was surveyed land (marked "Respondents' Exhibit 5").

Mr. HARDING: The same objection as those interposed to Exhibits 3 and 4.

Mr. CRANE: We next introduce in evidence a copy of the
135 certificate of purchase issued by the State of California to M. B. French under date of February 9th, 1866, certified by the register of the State land office, showing, as we claim, that on the

12th day of August, 1865, said French paid to the State of California the sum of one hundred and twelve dollars, being twenty per cent. of the purchase price and one year's interest in advance on the balance due the State for a part of the land in controversy, being the same land referred to in the agreed statement of facts, "Respondents' Exhibit 2," and also that it appears by the indorsements on the certificate that he afterwards paid to the State the full purchase price for the land, and that it further appears that it was surveyed land (marked "Respondents' Exhibit 6").

(The same objections by complainant.)

Mr. CRANE: I next introduce in evidence a copy of that portion of volume one of indemnity selections of record in the United States land office, certified by the register of the United States land office at San Francisco, showing, as we claim, the date of the application by the State of California for portions of sections 17, 19, and 21 in t'p 3 S., R. 3 E., and that said lands were treated and dealt with at that time by the United States officers as surveyed land (marked "Respondents' Exhibit 7").

Mr. HARDING: Complainant makes the same objections as interposed to "Exhibit 3," and in addition that it does not appear that said volume one is any official record; second, that this does not appear to be a copy of anything except in the opinion of the register of the land office.

Mr. CRANE: We next introduce in evidence a copy of two
136 pages of Tract Book No. 10, certified by the register of the United States land office, showing, as we claim, that all the State selections in sections 17, 19, and 21 in t'p 3 S., R. 3 E., Mount Diablo meridian, were entered therein between May 22d, 1863, and May 16th, 1864, and that said selections were finally approved and the land certified over to the State of California, one portion Nov. 15th, 1871, by list 23, and another portion on March 24th, 1873, by list 25, which lists are already in evidence (marked "Respondents' Exhibit 8").

(The same objections by complainant as those interposed to "Exhibit 3.")

Mr. CRANE: The said defendants next introduce in evidence copy of an amended township plat of township three south, range three east, Mount Diablo meridian, certified by the United States surveyor general for California, showing, as we claim, lot 37 delineated thereon as a portion of the Rancho Las Pocitas embraced by the survey of that grant by the surveyor general of the United States in 1865, and that said lot 37 embraces all the land in that township in controversy in this suit. (Marked "Respondents' Exhibit 9.")

Mr. HARDING: Objected to by complainant on the ground that this plat never was official as held by the Department of the Interior; that it was never filed in the local United States land office, and it is therefore irrelevant, incompetent, and immaterial.

Mr. CRANE: We next introduce in evidence copy, duly cer-
137 tified by the register of the United States land office at San

Francisco, of a letter of the surveyor general of the United States to the register of the land office of the United States at San Francisco, showing, as we claim, that the lands in said lot 37 had been deemed to be in a state of suspension up to the 3rd day of June, 1869, and directing that all the lands in lot 37 be continued suspended on account of proceedings relative to the survey of the Mexican grant Las Pocitas.

Also attached thereto copy, duly certified by the register of the United States land office at San Francisco, of a letter of the Commissioner of the General Land Office to the register and receiver of the United States land office at San Francisco, dated June 30th, 1870, showing, as we claim, that up to that date all the land- in township three south, range three east, embraced in the original survey of said grant Las Pocitas, namely, said lot 37, were in a state of suspension on account of the claims of said grant.

Also attached thereto like certified copy of a letter from the Commissioner of the General Land Office to the register and receiver of the United States land office at San Francisco, dated June 14th, 1871, showing, as we claim, that the second survey of the Rancho Las Pocitas had become final, and directing that any lands outside of said survey heretofore held in suspension and awaiting the final determination of the Las Pocitas claims be relieved from such suspension and dealt with as other public lands are dealt with.

The three letters above referred to, attached together, are (marked "Respondents' Exhibit 10.")

138 Mr. HARDING: The said letters are, and each of them is, objected to by complainant as irrelevant and immaterial.

By agreement of counsel, a recess was here taken until two o'clock this afternoon.

FRIDAY, *February 18th*, 1887—afternoon.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane and Mr. Mullany, of counsel for respondents.

Mr. CRANE: I now introduce in evidence copy, certified by the United States surveyor general for California, of a letter from the Commissioner of the General Land Office to the United States surveyor general for California, at San Francisco, dated June 7th, 1871, enclosing copy of decision of the acting Secretary of the Interior, showing, as we claim, that the survey of the Rancho Las Pocitas became final on the 6th day of June, 1871, and that said lands embraced in lot 37 were not relieved from suspension on account of claims under said grant until on and after said last-named date. (Marked "Respondents' Exhibit 11.")

(Objected to by complainant as irrelevant and immaterial.)

Mr. CRANE: On behalf of those defendants who claim the lands in controversy in township two south, range one east, Mount Diablo meridian, I introduce in evidence the following:

First. I introduce an agreed statement of facts in regard to that

portion of the land in controversy which is situate in that
139 township, showing, as we claim, in each case, first, all the material facts relative to the survey and subdivision of this township into sections and quarter sections by the United States surveyor general: second, the fact and date of the application to purchase, the name of the applicant, and description of the land sought to be purchased in each case; third, the fact, date, and manner of selection by the State locating agent; fourth, the fact and date of approval by the — States surveyor general and the issuance of the certificate of purchase to the purchaser; fifth, the fact and date of the entry and location in Tract Book No. 11 of the United States land office by the register of said land office; sixth, the fact and date of the issuance of patent and the name of the present holder of said title. (Marked Respondents' Exhibit 12.")

Mr. HARDING: We object to that on the ground that it is incompetent, irrelevant, and immaterial; that the facts therein stated relate to a question or to questions that have been finally decided by the Department of the Interior, and are now *res judicata*.

(It is admitted by both complainants and respondents that "Exhibit 12" is a true copy of the original agreed statement of facts.)

Mr. CRANE: We next introduce in evidence copy, duly certified by the register of the State land office, of a certificate of purchase issued by the State of California to Thomas Murphy, under date of July 11th, 1863, showing, as we claim, that on the 27th day of June,
1863, Thomas Murphy paid one hundred and twelve dollars,
140 being twenty per cent. of the purchase price and one year's interest in advance on the balance due the State, for a part of the land in controversy, being the same land referred to in the agreed statement of facts, "Respondents' Exhibit 12," and that it appears by indorsements on the certificate that the said Murphy afterward paid to the State the further sum of six hundred and sixty-nine dollars and seventy cents, being in full payment for the said land. (Marked "Respondents' Exhibit 13.")

Mr. HARDING: This certificate and the endorsements thereon are objected to as incompetent, irrelevant, and immaterial; that it appears on the face of the certificate to be for unsurveyed land, and is therefore void, and that it has been adjudged by the Department of the Interior to convey no title, right, or interest in or to the land therein described.

Mr. CRANE: We next introduce in evidence copy, duly certified by the register of the State land office, of a certificate of purchase issued by the State of California to Samuel B. Martin, under date of March 2nd, 1863, showing, as we claim, a similar state of facts as shown in the former certificate introduced.

(Marked "Respondents' Exhibit 14.")

The same objection by complainant.

Mr. CRANE: I next introduce in evidence like certified copy of a certificate of purchase, together with the endorsements thereon,

issued by the State of California to J. B. Purdy, under date of January 25th, 1864, showing, as we claim, a similar condition of facts as shown in the certificate "Respondents' Exhibit 13."
141 (Marked Respondents' Exhibit 15.)

The same objection by complainant.

Mr. CRANE: I next introduce in evidence like certified copy of certificate of purchase issued by the State of California to Marshal M. English, together with the endorsements thereon, under date of 25th of January, 1864, showing, as we claim, a similar state of facts as shown in the certificate "Respondents' Exhibit 13." (Marked "Respondents' Exhibit 16.")

(The same objections by complainant.)

Mr. CRANE: I next introduce in evidence like certified copy of a certificate of purchase issued by the State of California to A. J. Shrader, under date of July 1st, 1869, showing upon its face that on the 14th day of March, 1865, A. J. Shrader paid to the State of California the sum of fifty-six dollars, being twenty per cent. of the purchase-money and first year's interest in advance on the balance for the land described in the certificate, together with the endorsements thereon, showing that the balance of the purchase price had been paid to the State on the 3rd day of September, 1870. (Marked "Respondents' Exhibit 17.")

(The same objection by complainant.)

Mr. CRANE: I next introduce in evidence like certified copy of certificate of purchase issued by the State of California to Samuel Davis, under date of March 31st, 1870, showing upon its face that on the 20th day of February, 1865, the said Samuel Davis paid to the State of California the sum of one hundred and twelve dollars, that being 20 per cent. of the purchase-money and first year's interest in advance on the balance for the land described in the cer-
142 tificate, and also the endorsements thereon, showing that the balance of the purchase-money for that land was paid on the 3rd day of April, 1871. (Marked "Respondents' Exhibit 18.")

(The same objection by complainant.)

Mr. CRANE: We next introduce in evidence like certified copy of a certificate of purchase issued by the State of California to C. F. Goodrich under date of December 9th, 1870, showing upon its face that on the 28th day of November, 1870, said C. F. Goodrich paid to the State of California the sum of $83, being 20 per cent. of the purchase-money and first year's interest on the balance in advance for the land described in the certificate, and also the endorsements thereon, showing that the balance of the purchase-money was paid on the 4th day of December, 1871.
(Marked "Respondents' Exhibit 19.")

Mr. HARDING: We make the same objections, and we also further object on the ground that the certificate is absolutely nul- and void and not issued in accordance with any law of this State and cover-

ing land to which title was vested in the railroad company at the time of the issuance of said certificate.

Mr. CRANE: I next introduce in evidence like certified copy of a certificate of purchase issued by the State of California to F. O. Wakeman under date of December 9th, 1870, showing upon its face that said Wakeman paid to the State of California the sum of $83 on the 28th day of November, 1870, that being 20 per cent. of the purchase price, the first year's interest on the balance in advance, together with the endorsements thereon, showing that the
143 balance of the purchase price was paid on the 4th day of December, 1871.

Marked " Respondents' Exhibit 20."

The same objections by comp-ainant as were interposed to " Exhibit 19."

Mr. CRANE: I now introduce in evidence copy, duly certified by the register of the United States land office, of that portion of volume one of indemnity selections of record in the United States land office, showing, as we claim, the date of application by the State of California for the location of the said lands in township 2 south, range 1 east, Mount Diablo meridian.

(Marked " Respondents' Exhibit 21.")

Mr. HARDING: I object to the introduction of that document on the ground that it is incompetent, irrelevant, and immaterial, and on the further ground that there is no such official record as volume one referred to in " Exhibit 21 " in the United States land office.

Mr. CRANE: I next introduce in evidence copy, duly certified by the register of the United States land office, of two pages of Tract Book No. 11, showing, as we claim, that all the selections in controversy in township 2 south, range 1 east, Mount Diablo meridian, were entered therein on June 12th and 13th, 1865, and that said selections were finally approved and the land certified over to the State of California on September 8th, 1870, by list 18, and on March 11th, 1871, by list 20. Marked (" Respondents' Exhibit 22.")

Objected to by complainant as incompetent, irrelevant, and immaterial.

144 Mr. MULLANY: Let it be noted that so far as to proof I propose to make on the part of the defendants for whom I appear, Mr. Crane, appearing for all the defendants, adopts the same proof for all his clients. Is that so, Mr. Crane?

Mr. CRANE: Yes, sir.

Mr. MULLANY: For the purpose of showing & proving that the lands in controversy described in the bill of complaint herein were and all of them were held and claimed as part of the Mexican grant Las Pocitas, originally made and granted to Jose Noriega and Robert Livermore, and were so held and claimed until a time long after the line of the road of the Central Pacific Railroad Company of California and of the Western Division thereof, known as the road of the Western Pacific Railroad Company, was definitely fixed, I introduce in evidence copy, duly certified by the United States

surveyor general for California, of the original grant of said Rancho Las Pocitas in the Spanish language, made by the duly constituted officers, whose names appear thereto in their proper relations and positions.

In connection with said original grant I also introduce in evidence the original diseño therein referred to. (The said two documents last above referred to, attached together, are marked " Respondents' Exhibit 23.")

Mr. HARDING: Complainant objects to this testimony and to all testimony on the same question for the reason that the boundaries of the land held and claimed under the Las Pocitas grant
145 have been defined, settled, & fixed and fully and finally adjudged by the Department of the Interior, and that the question now is *res judicata*, and that all evidence pertaining to that question is therefore incompetent, irrelavent, and immaterial to any issue in this case.

(Complainant, without waiving his objections heretofore interposed, admits the fact that the said grant of Las Pocitas was approved by the departmental assemby of the Mexican Government on the 10th day of June, 1840.)

(It is stipulated and agreed by and between counsel for the respective parties herein that the objections last above interposed shall be considered as interposed to all documentary evidence hereafter to be introduced with relation to the Las Pocitas grant, and that said objections shall have the same force and effect as if interposed to each document as introduced.)

Mr. MULLANY: I next introduce in evidence a certified copy of pages 12, 13, & 14 of Transcript of Board of Land Commissioners in the case of José Noriega and Robert Livermore as the same appears of record in the office of the clerk of the United States district court for the northern district of California, being an English translation of the grant " Exhibit 23."

Also, in connection therewith and attached thereto, I introduce in evidence an English translation of said Mexican grant Las Pocitas, and also the approval thereof by the departmental assembly of date June 10th, 1840, which are duly certified by the clerk of the
146 United States district court for the northern district of California, as stated in the certificate attached thereto.

Also, in connection therewith and attached thereto, I introduce in evidence a duly certified copy of the petition presented by Jose Noriega and Robert Livermore for the confirmation of said grant Las Pocitas to them by the board of land commissioners, which was filed in the office of said board on the 27th of February, 1852.

Also, in connection therewith and attached thereto, like certified copy of the decree of confirmation in said cause by the board of land commissioners and which bears date February 14th, 1854.

Also, in connection therewith and attached thereto, like certified copy of notice of appeal from said decision of the board of land commissioners of the United States district court for the northern dis-

trict of California, with all the indorsements, dates, and contents thereof, filed February 20th, 1855.

Also, in connection therewith and attached thereto, like certified copy of the petition of the United States to the said district court for a review of the decision of the United States land commission, whereby the title of said Noriega and Livermore was confirmed to said grant, with all the endorsements thereon and dates, filed July 14th, 1857.

Also, in connection therewith and attached thereto, like certified copy of order reviving the suit in the names of the executor and executrix of the last will & testament of Robert Livermore, de-
147 ceased, with all its dates and endorsements, filed February 3rd, 1859, in the office of the clerk of said district court.

Also, in connection therewith and attached thereto, like certified copy of order granting appeal in said cause, filed February 19th, 1859.

Also, in connection therewith and attached thereto, copy, certified by the United States surveyor general for California, of the decree of said district court in the case of The United States *vs.* José Noriega *et al.*, affirming the title to said grant, dated February 18th, 1859.

Also, in connection therewith and attached thereto, like certified copy of the writ of mandate issued from the United States Supreme Court on the first Monday of December, 1860, under the seal of said court, that being a mere certificate of the clerk as to the time when the cause was disposed of by that court, and it was filed in the office of the clerk of the United States district court for the northern district of California on February 24th, 1865.

Also, in connection therewith and attached thereto, the order of the said district court that the said mandate be filed and that the said claimants of said land be allowed to proceed under the decree of said district court, affirmed by the Supreme Court of the United States as under final decree, which said order was filed February 24th 1865, in said United States district court.

Also, in connection therewith and attached thereto, copy,
148 duly certified by the clerk of the United States district court of the northern district of California, — an order that said mandate be filed in said United States district court, dated February 24th, 1865.

(The documents last above referred to, attached together, are marked " Respondents' Exhibit 24.")

(By agreement of counsel for the respective parties herein the time within which testimony may be taken is extended to and including the first day of March, 1887.)

Examination continued, pursuant to agreement of counsel, to Monday, the 28th day of February, 1887, at half past ten o'clock a. m.

MONDAY, *February 28th*, 1887.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane & Mr. Mullany, of counsel for respondents.

Examination continued, at request of counsel for respondents,

complainant consenting, to Wednesday, March 9th, 1887, at half past ten o'clock a. m.

WEDNESDAY, *March 9th*, 1887.

Examination further continued, by agreement of counsel, to Tuesday, March 15th, at half past ten o'clock a. m.

TUESDAY, *March 15th*, 1887.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane & Mr. Mullany, of counsel for respondents.

149 Mr. CRANE: As to the lands in township three south, range three east, I desire to introduce in evidence a few pieces of supplemental documentary evidence:

First. I introduce the township plat of township three south, range three east, Mount Diablo meridian, being a certified copy from the General Land Office of the United States, showing that the same was received at the General Land Office in or about the month of December, 1862, or January, 1863, and being the same plat mentioned in "Respondents' Exhibit 20." (Marked "Respondents' Exhibit 25.")

Mr. HARDING: We object to the document on the ground that it is incompetent, irrelevant, and immaterial; that it is not official; that it does not appear of record to have been filed in the local land office or to have been recognized or acted upon as an official survey; and on the further ground that it has been expressly adjudged by the Department of the Interior not to be official and of no force or effect.

Mr. CRANE: I next introduce in evidence a certified copy of township plat of township three south, range three east, Mount Diablo meridian, duly certified by the register of the United States land office at San Francisco, and purporting to have been filed in the United States land office at San Francisco, California, on the 1st day of July, 1871, being the permanent township plat of that township filed after the suspension on account of the Las Pocitas grant was removed.

150 (Marked "Respondents' Exhibit 26.")

(Objected to by complainant as irrelevant and immaterial.)

Mr. MULLANY: In connection with "Exhibit 24" and such other exhibits as preceded it concerning the Mexican grant Las Pocitas I introduce in evidence the instructions of the United States surveyor general to E. H. Dyer, a United States deputy surveyor, to make a survey of the Rancho Las Pocitas, which instructions are dated September 21st, 1865.

(Marked "Respondents' Exhibit 27.")

The above "Exhibit 27" is attached to and certified in connection with Exhibits 30 to 43, both inclusive.

Mr. HARDING: In addition to the objections interposed to "Respondents' Exhibit 23" complainant further objects to the document "Exhibit 27" on the ground that it is not signed by the sur-

veyor general or any person for or in his name, and it does not appear to be authenticated in any manner, and that the so-called instructions are no instructions at all.

Mr. MULLANY: I next introduce in evidence the field-notes of the survey made by said E. H. Dyer in pursuance of the instructions, "Exhibit 27." (Marked Respondents' Exhibit 28.") I also introduce in evidence the plat or map of the survey made by said E. H. Dyer in pursuance of the instructions, "Exhibit 27," and the field-notes, "Exhibit 28," and which plat and field-notes, "Exhibit 28," include all the lands involved in this suit.

151 (Marked "Respondents' Exhibit 29.")

I also introduce in evidence the letter attached to "Exhibit 27" of Mr. Edward J. Pringle, addressed to the United States surveyor general for California, dated February 26th, 1866, wherein & whereby, as attorney for the claimants of said Mexican grant Las Pocitas, he on their part claimed all of the lands within the exterior boundaries, including the land within the Dyer survey, so called, being the field-notes and plat marked respectively Exhibits 28 & 29, and asking that the same and the whole thereof be confirmed and allowed to the claimants of said grant. (Marked "Respondents' Exhibit 30.")

I also introduce in evidence, in connection therewith and attached to said "Exhibit 27" and said letter, "Exhibit 30," the letter or official communication of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 30th, 1868, whereby instructions are given to reduce the quantity of land within the exterior boundaries of the Rancho Las Pocitas to two square leagues before confirmation.

(Marked "Respondents' Exhibit 31.")

Also, in connection therewith and attached to said last exhibit, I introduce in evidence a communication of the Commissioner of the General Land Office, directed to the United States surveyor general for California, dated August 5th, 1868, whereby the instructions contained in "Exhibit 31" are communicated to the United States surveyor general for California.

152 (Marked "Respondents' Exhibit 32.")

Also, in connection therewith and attached thereto, I introduce in evidence the letter of Mr. Charles McLaughlin, as land agent for the Western Pacific Railroad Company, addressed to Sherman Day, United States surveyor general for California, dated December 28th, 1868, being in substance an inquiry made as to why the survey of the Rancho Las Pocitas has not been made in accordance with the order of the Department of the Interior of August, 1868.

(Marked "Respondents' Exhibit 33.")

Also, in connection therewith and attached thereto, I introduce in evidence a letter addressed by James W. McCorkle to the Commissioner of the General Land office, dated January 14th, 1869, wherein a peremptory request is made that the Rancho Las Pocitas be surveyed.

(Marked "Respondents' Exhibit 34.")

Also, in connection therewith and attached thereto, I introduce in

evidence a letter of the Commissioner of the General Land Office addressed to Sherman Day, United States surveyor general for California, dated January 30th, 1869, directing that the said surveyor general proceed to make survey of the Rancho Las Pocitas.

(Marked " Respondents' Exhibit 35.")

Also, in connection therewith and attached thereto, I introduce in evidence the instructions and order given by the United States surveyor general for California to said E. H. Dyer, United States deputy surveyor, dated March 2nd, 1869, instructing him, the said deputy surveyor, to reduce the former survey of the Rancho Las
153 Pocitas to the quantity of two square leagues so as to conform to the instructions from the honorable Commissioner.

(Marked " Respondents' Exhibit 36.")

Also, in connection therewith and attached thereto, I introduce in evidence the communication of the Commissioner of the General Land Office directed to the United States surveyor general for California, dated June 16th, 1869, wherein it is stated that for the guidance of said surveyor general he is advised of the pendency of an application by the heirs of Livermore for a reconsideration of the decision of the Department, dated July 30th, 1868, and that *that* sixty days from the service of the notice upon the adverse party *has* been allowed for filing in that office such briefs by the claimants of said grant as they might think proper to file in order to obtain for them the confirmation of the grant as surveyed by E. H. Dyer in 1865.

(Marked " Respondents' Exhibit 37.")

Also, in connection therewith and attached thereto, I introduce in evidence a communication of the Commissioner of the General Land Office to the United States surveyor general for California, dated December 22d, 1869, whereby in substance said surveyor general is informed that the Secretary of the Interior has decided not to reconsider the decision of July 30th, 1868.

(Marked " Respondents' Exhibit 38.")

Also, in connection therewith and attached thereto, I introduce in evidence a communication of the Secretary of the Interior
154 directed to the Commissioner of the General Land Office, dated December 4th, 1869, and which is the opinion or decision referred to in " Exhibit 38," last put in evidence, with his reasons therefor.

(Marked " Respondents' Exhibit 39.")

Also, in connection therewith and attached thereto, I introduce in evidence a letter or communication of the Commissioner of the General Land Office directed to the United States surveyor general for California, dated March 1st, 1871, whereby he approves of the plat and survey secondly made by said E. H. Dyer of the Rancho Las Pocitas, and whereby he states that thirty days are allowed from service of a notice upon the claimants for an appeal to the Secretary of the Interior from his decision in that behalf.

(Marked " Respondents' Exhibit 40.")

Also, in connection therewith and attached thereto, I introduce in evidence the letter or communication of the Commissioner of the General Land Office to the United States surveyor general for Cali-

fornia, dated June 7th, 1871, instructing said United States surveyor general that the Secretary of the Interior had affirmed the decision of the Commissioner of the General Land Office, dated March 1st, 1871, whereby the second survey made by the said E. H. Dyer of the Rancho Las Pocitas was confirmed.

(Marked "Respondents' Exhibit 41.")

Also, in connection therewith and attached thereto, I introduce in evidence the letter or communication of the acting Secretary of the Interior directed to the Commissioner of the General Land Office, dated June 6th, 1871, which is the decision mentioned in
155 "Exhibit 41," whereby said second survey made by said E. H. Dyer of said Rancho Las Pocitas has been affirmed.

(Marked "Respondents' Exhibit 42.")

Also, in connection therewith and attached thereto, I introduce in evidence the letter or communication of the Commissioner of the General Land Office directed to the United States surveyor general for California, dated May 27th, 1872, whereby a patent was transmitted with instructions to deliver the same to the grantees or their assigns of the said grant Las Pocitas for the land described and surveyed by the second survey made by said E. H. Dyer.

(Marked "Respondents' Exhibit 43.")

(Respondents' exhibits numbered respectively 27 and 30 to 43, both inclusive, attached together, are certified by the United States surveyor general for California as correct copies of original documents on file in the office of said surveyor general.)

Mr. MULLANY: I now introduce in evidence copy, duly certified by the United States surveyor general for California, of the original grant of José Dolores Pacheco, mentioned in the grant Las Pocitas as forming the western boundary thereof.

(Marked "Respondents' Exhibit 44.")

Also, in connection therewith, like certified copy of a translation into the English language of said grant of Jose Dolores Pacheco.

(Marked "Respondents' Exhibit 45.")

Also, in the same connection, I introduce like certified
156 copy of the diseño of said grant to Jose Dolores Pacheco.

(Marked "Respondents' Exhibit 46.")

I also introduce in evidence, in connection with the exhibits referring to the Mexican grant Las Pocitas, a copy, duly certified by the Commissioner of the General Land Office, of the map of the Western Pacific Railroad Company's road after the construction thereof, and upon which map said company have designated, delineated, and platted the Mexican grant Las Pocitas, and thereby recognized its boundaries as being coextensive with the survey thereof made by said E. H. Dyer in the year 1865, which was at the time this map was constructed still under consideration by the Department of the Interior as being the true boundaries of said grant, and which delineation upon this map of the said Las Pocitas grant includes all the lands in controversy in this suit.

(Marked "Respondents' Exhibit 47.")

Mr. HARDING: We object to counsel arguing his case and con-

struing his documents and what they contain as he proceeds to introduce his evidence. The documents themselves are the best evidence of what they contain.

Deposition of Rufus C. Hopkins.

Examination-in-chief of RUFUS C. HOPKINS on behalf of respondents:

(By Mr. MULLANY:)

157 Q. 1. State your name, age, place of residence, and occupation.

A. My name is Rufus C. Hopkins; my age is seventy years; my place of residence is San Francisco, and at present I am without occupation.

Q. 2. Have you had any experience in your time in connection with the archives kept of the Mexican grants to lands in this State? And, if so, please state what it was.

A. From 1855 to 1879 I had charge of the Spanish archives in the office of the United States surveyor general for California, which contains the records of Spanish land grants in this State. From 1879 until the present year I was occupied in the same business in Arizona and Mexico in collecting records relating to grants in Arizona and examining the same.

Q. 3. Do you understand the Spanish language?

A. I do.

Q. 4. Are you capable of translating from Spanish into English and from English into Spanish?

A. I am.

Q. 5. How long have you been thus capable to translate and thus understand the Spanish language?

A. For a great many years; about forty years, I suppose; since early life.

Q. 6. State whether you are familiar with the method of describing grants which the Mexican authorities had been accustomed to here before the conquest of California by the American Government.

A. I am familiar with such customs.

Q. 7. Do you know of the grant called Las Pocitas, located in the counties of Alameda & Contra Costa?

158 Respondent consents that each question asked this witness with relation to the Las Pocitas rancho—the limits, boundaries, or extent thereof, or having any bearing on the same—shall be deemed as objected to by complainant as incompetent, irrelevant, and immaterial to any issue in this suit, and that those questions have all been settled by authority of law and are now *res judicata*.

A. I know of such a grant; yes, sir.

Q. 8. Do you know of the grant known as the José Dolores Tacheco grant mentioned in the description of the Las Pocitas grant?

A. I do. That is the Santa Rita, is it not?

Q. 9. Yes; the Santa Rita.

A. Yes, sir.

Q. 10. Have you made any examination or familiarized yourself with the boundaries of the Mexican grant Las Pocitas?

A. I have examined the original title papers of the grant Las Pocitas relating to its boundaries and also the grants of the surrounding ranchos.

Q. 11. Including the Pacheco grant?

A. Yes, sir; and also the Cañada de los Vagueros.

Q. 12. Is that on the north of the Las Pocitas?

A. It lies to the north, I believe. It has a common boundary with the Las Pocitas, as called for.

Q. 13. Do you know where the "Lomas de las Caevas" mentioned in the description of the Las Pocitas grant are located?

A. I know the location of them.

159 Q. 14. Do you know the location of the "Sierra de Buenos Ayers" mentioned in the description of the Las Pocitas grant?

A. I do.

Q. 15. Do you know the location of the rancho of Don Jose Dolores Pacheco, which is sometimes called the "Santa Rita" rancho, with regard to the Las Pocitas rancho?

A. I know the location of this rancho as called for in the original title papers of the Santa Rita rancho, and also with respect to the Rancho Las Pocitas.

Q. 16. I will show you this map or diagram, marked "Exhibit Hopkins," and ask you if you were the person who made that.

A. I made this map or diagram.

Q. 17. Do you know the survey made of the Rancho Las Pocitas by Mr. E. H. Dyer, a United States deputy surveyor, about the year 1865?

A. I know of such a survey; yes, sir.

Q. 18. Did you know of it at the time it was made?

A. I knew that the survey was being made at the time it was made.

Q. 19. Did you have any connection with the survey as keeper of the archives in the surveyor general's office? And, if so, please state what that connection was.

A. I furnished such data as was required from the archives to the chief clerk or surveyor general which were used in surveying ranches at that time.

Q. 20. Please state whether or not you furnished data for
160 the making of the survey by Mr. Dyer of the Rancho Las Pocitas in 1865.

A. My recollection is that I furnished such data as were shown by the archives for that rancho and the exterior boundaries of the Las Pocitas rancho; that is my recollection.

Q. 21. For the purpose of making that survey in 1865?

A. Yes, sir; I will say also that for all surveys in such times I furnished such data as were found in the archives that were required for the surveys.

Q. 22. The decree of confirmation in this case by the United States district court I will now place in your hands, which decree was made in 1859, and I will call your attention to the adjudicated part of i , setting forth the boundaries, and ask you to please read the boundaries there.

A. On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco.

Q. 23. Now, Mr. Hopkins, what instructions did you give from the archives and records of the surveyor general's office with regard to the making of the survey by Deputy Surveyor E. H. Dyer, in 1865, of the Rancho Las Pocitas?

A. I gave no instructions, but I furnished data.

Q. 24. I beg pardon; what data did you furnish?

161 A. I gave an abstract of the calls and the description of the grant Las Pocitas, and also of the surrounding grants—the Santa Rita, for instance—showing that that ranch was called for as a boundary. I gave, in short, all data that would thrown any light upon the boundaries of this rancho. I gave them to the general clerk, whose duty it was to prepare the instructions for the surveyor general to sign. I was the only one who understood the Spanish language in the office or who could read the original title papers.

Q. 25. Look at this diagram, "Exhibit Hopkins," which I have laid before you and which was made by yourself, and kindly state what data you made use of or information you worked upon in making that diagram or map.

A. This diagram was compiled from the original title papers found in the archives, and also from record maps of official surveys which I examined, some of the title maps, and one of which was the official plat.

Q. 26. Are the natural monuments or objects on the ground which are referred to in the description of the Las Pocitas grant correctly delineated on that diagram or map, "Exhibit Hopkins?"

A. They are correctly delineated. I presume they are, since they are taken from maps that were made from official surveys. This "Tasajara creek," for instance, was taken from a map of an official survey. From an official survey the "Lomas de las Cuevas" are on the north of the Las Pocitas grant.

162 Q. 27. Do you know that actually on the ground?

A. I have examined them on the ground or, at least, I have seen them on the ground. I know that the "Lomas de las Cuevas" exist in that locality.

Q. 28. You saw them & know their location?

A. Yes, sir.

Q. 29. I will ask you, in that connection, have you observed on the ground the location of the "Lomas de las Cuevas?"

(Question objected to by complainant as leading and withdrawn.)

Q. 30. Do you know on the ground, from your own knowledge, the location of the Sierra de Buenos Ayres?

A. I do.

Q. 31. State on what side of the Las Pocitas rancho the Sierra de Buenos Ayres are located.

A. On the east.

Q. 32. Now state whether the location of these two natural boundaries of the Las Pocitas rancho are correctly delineated on that map or diagram, "Exhibit Hopkins."

A. They are approximately correct—located with approximate correctness.

Q. 33. State where the Tasajara creek is located with regard to the Las Pocitas rancho and also with regard to the rancho of Don Jose Dolores Pacheco.

A. It is to the west of the Las Pocitas and to the east of the Santa Rita, as called for in the original title papers, being the common boundary between those two ranches, as called for in the original title papers.

163 Q. 34. Now, please explain how you arrived at that conclusion as to the location of the Tasajara creek.

A. Do you mean as to its being the western boundary of the Las Pocitas rancho?

Q. 35. The western boundary of the Las Pocitas and the eastern boundary of the rancho of Don Jose Dolores Pacheco?

A. On examining the original title papers of the Santa Rita rancho I found that a tract was called for between the "Sitio San Ramon" and the "Tasajara creek," and that would make the Tasajara creek the eastern boundary of the Santa Rita, and since the grant of the Las Pocitas calls for the lands of Dolores Pacheco, the Santa Rita rancho as a boundary, that would necessarily make the Tasajara creek a common boundary between the two ranches.

Q. 36. Here is the grant of the Santa Rita rancho in Spanish and also an English translation of that grant or of the lands of Jose Dolores Pacheco. Now, please look at the calls of that grant—please read them and then explain the connection between that and the Las Pocitas.

(Question objected to by complainant as leading and withdrawn.)

Mr. HARDING: As an additional objection complainant objects to this witness giving his opinion as to the location of any of these grants on the ground that he is not shown to be a surveyor; that it has not been shown that he ever surveyed any of these

164 grants or that he is competent to speak in reference to that subject, and that his mere opinion as to what the location of each of these grants ought to be is incompetent, irrelevant, and immaterial.

The WITNESS: I desire to finish my answer to question 35. The grant of the Rancho Santa Rita calls by name for a line running from the "Palos Secos," through the "tula," along the "Tasajara creek," to the "Loma Alta"—"High Hill."

Q. 37. State whether that line is drawn in a northerly direction from the starting point.

A. It runs in a northerly direction.

Q. 38. State whether there is any other monument or subject for description called for in the description of the Santa Rita rancho on the east or north side; and, if so, state what it is.

A. By reference to the grant I can tell.

Q. 39. Well, please refer to it.

A. It also calls for the "sierra" and "lands of Bartolo Pacheco."

Q. 40. On what side of it?

A. That would be on the north. It is the line that runs to the sierra.

Q. 41. Does that mean running to the sierra on the north?

A. Yes; on the north or towards the north.

Q. 42. What sierra is that?

A. I should judge it would be a portion of the sierra towards Mount Diablo; but it simply says sierra. It is indefinite and vague, but in that direction is located Mount Diablo.

165 (By agreement of counsel a recess was here taken until two o'clock this afternoon.)

TUESDAY, *March 15th*, 1887—afternoon.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane and Mr. Mullany, of counsel for respondents.

Examination-in-chief of RUFUS C. HOPKINS continued:

Q. 43. Do you know where the rancho or grant known as the Cañada de los Vaqueros is located?

A. I do.

Q. 44. With regard to the Las Pocitas rancho, where is that grant; where was it made or granted?

A. It lies to the north of the Las Pocitas, and calls for the Las Pocitas and Las Cuevas as a boundary—that is, my recollection is that it calls for the lands of Livermore and Las Cuevas as the southern boundary.

Mr. HARDING: Complainant moves to strike out all the answer after the first words, "Las Pocitas," as incomp-tent, on the ground that the grant itself is the best evidence as to its contents and its calls.

Q. 45. I will show you the map or plat made by Dyer of the Rancho Las Pocitas in 1865, which is here known as "Exhibit 29," on the part of the respondents, and ask you if you have ever seen that map before.

A. I have.

Q. 46. Now, taking the description of the grant Las Pocitas as being bounded on the north by the Lomas de las Cuevas and
166 on the east by the Sierra de Buenos, on the west by the rancho of Don Jose Dolores Pacheco, and on the south by the estab-

lishment of San Jose, and please state whether that plat made by Dyer of his survey is within those boundaries.

Mr. HARDING: In addition to the objections already made to this testimony we object to the competency of this witness as an expert to give an opinion in response to the question, on the ground that he has not been shown to be an expert or a surveyor, or that he has any experience in the location of Spanish grants or the survey of them.

A. I think it is. The boundary, "the establishment of San Jose," is not a natural bounndary, but I think it was within the exterior boundaries.

Q. 47. Do you know of your own knowledge where the Tasajara creek is?

A. I know where it is; yes, sir.

Q. 48. Do you know of your own knowledge where the Lomas de las Cuevas are?

A. I do.

Q. 49. Do you know of your own knowledge where the Sierra de Buenos Ayres is?

A. Yes, sir; I do.

Q. 50. Now, going by these three natural boundaries as I have described them to you, and taking a line from the extreme southeastern portion of the Tasajara creek as being the boundary of the Mission San Jose lands, would all the lands that are designated on this plat by Mr. Dyer, made by him in 1865, be within the boundaries of the Las Pocitas, as I have described it, within those boundaries; would they be within those boundaries as I have de-
167 scribed them and as they are thus described in the grant?

(The same objections by complainant.)

A. I think they would. In place of taking the mouth of the Tasajara creek, I would take the "Palos Secos," represented on the "Exhibit Hopkins," now before me, as the southern terminus of the eastern boundary of the Santa Rita rancho, which would be the western boundary of the Las Pocitas rancho.

Q. 51. Now, will you please explain on the record how you would ascertain the location of the southern boundary of the Rancho Las Pocitas, designated in the decree of confirmation by the district court as the line of the "establishment of San Jose."

A. By running a direct line from the Palos Secos to the southern terminus of the Buenos Ayres, which is the eastern boundary of the Las Pocitas.

Q. 52. Now, then, taking the line of the establishment of San José as thus drawn, would all the lands thus laid down upon that plat made by Dyer in 1865 of the Rancho Las Pocitas be within those boundaries named?

The same objections by complainant.

A. They would.

Mr. HARDING: I would like to have it appear on the record that

the witness in answering all these questions has testified from the plat before him.

The WITNESS: I did not refer to the map in answering that question.

168 Q. 55. Now, Mr. Hopkins, do you know where sections 13 and 15, in township 2 south, range 1 east, are located with regard to this survey made by Mr. Dyer in 1865, as to whether they are within it or not?

A. I cannot tell without referring to the map.

Q. 54. Please state whether the plat of the Las Pocitas grant, made by E. H. Dyer in 1865, is correctly laid down and delineated on that map marked Exhibit Hopkins.

A. It is.

Q. 55. How is it represented?

A. By lines shaded red.

Q. 56. With regard to that survey made by E. H. Dyer in 1865, is the Tasajara creek correctly delineated on that map, "Exhibit Hopkins?"

A. It is.

Q. 57. Are the Lomas de las Cuevas correctly marked on it with regard to that survey made by Mr. Dyer in 1865?

A. They are approximately correctly represented, as near as I could locate them from the data which I had.

Q. 58. Is the Sierra de Buenos Ayres correctly located on that map with reference to the survey of the Rancho Las Pocitas made by Mr. Dyer in 1865?

A. It is approximately so.

Q. 59. Is the rancho of Don Jose Dolores Pacheco, sometimes called the Santa Rita Rancho property, marked and laid down on that map with regard to the Dyer survey of 1865?

Mr. HARDING: We object to that question and all similar questions on the ground that this witness has not been shown to be an expert and has not been shown to be competent to make a map of that character, never having examined the topography of the country, and not being a surveyor or engineer.

Mr. MULLANY: I will withdraw the question.

169 Q. 60. State whether the townships and the sections of the public surveys are properly delineated on that map, marked "Exhibit Hopkins," with regard to and by reference to the Dyer survey of 1865.

A. They are.

Q. 61. State whether section 13, in township 2 south, range 1 east, Mount Diablo base and meridian, is within the Dyer survey of 1865 of the Las Pocitas rancho.

Mr. HARDING: We object as incompetent, the paper itself being the best evidence of what is within it.

A. It is.

Q. 62. Do you know the description of the lands in controversy in this suit?

A. Only by certain data that was furnished me when I made this map, "Exhibit Hopkins," which shows certain sections colored, which I understood were in controversy.

Q. 63. Have you marked the lands which were thus indicated to you as being in controversy on this map?

A. I have.

Q. 64. In what colors have you marked them on it?

A. In blue.

Q. 65. Have you designated on that map made by you, "Exhibit Hopkins," the location of the Rancho Cañada de los Vaqueros?

A. I have.

Q. 66. From what data did you locate that rancho on that map, "Exhibit Hopkins?"

A. From the original title papers and from the map of the patented survey of that rancho.

Q. 67. During the time that you were engaged in the United States surveyor general's office in this State and in connection
170 with the archives of Spanish and Mexican grants, please state what your duties were in connection with these archives and with the records of that office.

A. My duties were to furnish all persons who came to the office with such information as I could give, and to furnish the office with translations, when required, of documents on file in the archives; and very often I was required and specially directed by the United States surveyor general to go upon the ground and make examination of surveys and make examination of boundaries of grants from the original title papers and make reports, and I have done that in a great many cases.

Q. 68. During how many years did you do that?

A. From 1855 to 1879. I did that in the case of the Santa Rita, in 1860.

Q. 69. Have you been upon the ground to see the natural boundaries of the Rancho Las Pocitas?

A. I have.

(Respondent introduces in evidence the map or diagram, "Exhibit Hopkins," hereinabove referred to.)

Mr. HARDING: Complainant objects to the introduction in evidence of "Exhibit Hopkins" on the ground that it has not been shown to be correct or to have been compiled from official data, and that it at most is but a skeleton map, as the principal features of the topography of the country are omitted.

Q. 70. Please state whether the Las Pocitas grant, as officially located and patented, is correctly delineated and shown on this map marked "Exhibit Hopkins."

A. It is.

Q. 71. By what color is it designated on that map?

A. Yellow.

171 Q. 72. Is it wholly within the Dyer survey?

A. It is.

Q. 73. Please look at this tracing which I now show you and state whether it is a true copy of the map "Exhibit Hopkins."

A. It is a correct tracing of the original.

By Mr. HARDING:

Q. 74. Did you make that copy, Mr. Hopkins?

A. I made the original map. I did not make the tracing.

By Mr. MULLANY:

Q. 75. You state that it is an exact copy of the original map, Exhibit Hopkins?

A. It is.

Mr. MULLANY: For the purposes of convenience and that the record may be preserved the better, I offer to substitute the tracing or copy which has been testified by the witness to be a correct copy of the map made by him, "Exhibit Hopkins," in place of the original, with the right to any party concerned to take and examine or make any use they please in the case of the original, if they think they can benefit by it.

Mr. HARDING: I will make the same objection to the copy as was made to the original map, and none other.

Cross-examination of RUFUS C. HOPKINS:

(By Mr. HARDING:)

Q. 1. This map, "Exhibit Hopkins," does not purport to contain completely any one document, does it?

A. No, sir.

Q. 2. Does it completely represent any document, survey, or paper whatever?

A. As far as it goes.

Q. 3. That is not what I am asking you. I am asking
172 you if it completely represents any survey, paper, or document whatever?

A. It does.

Q. 4. What document, paper, or survey does it completely represent?

A. It represents the Dyer survey.

Q. 5. The Dyer survey. Made when?

A. In 1865, I believe. I will not say with perfect exactitude, but it represents the Dyer survey of the exterior boundaries, and it represents the location of the two leagues of the Las Pocitas.

Q. 6. I did not ask you what papers it represents. I asked you if it represented completely any paper, survey, or document whatever.

A. I answered that it does, and you asked me what it completely represented and I was answering that question and you stopped me. It represents the location of the Rancho Cañada de los Vaqueros, as patented.

Q. 7. Does the Dyer survey, "Respondents' Exhibit 29," represent the Arroyo Mocho?

A. It does.

Q. 8. Does the map, "Exhibit Hopkins," purport to show the topograph- indicated on the diseño of the Las Pocitas rancho?

A. Not exactly as shown upon the diseño. The diseño, I think, is very rude.

Mr. HARDING: I move to strike out the last clause of the answer as being volunteer and not responsive.

Q. 9. Does the map, "Exhibit Hopkins," show any of the interior topography indicated on the diseño?

A. (Referring to a copy of the diseño contained in "Exhibit 23" and to the document, "Exhibit Hopkins.") No, sir.

173 Q. 10. I understand you that in forming your opinion as to the location of the boundaries of the Las Pocitas rancho you attach great importance to the fact that the Tasajara, a stream of water or cañon, is one of the calls in the title papers of the Santa Rita rancho. Is that so?

A. That is true; I do.

Q. 11. Does that stream form a boundary of that grant as it is surveyed and finally located?

A. No, sir.

Q. 12. Is not the larger portion of the Santa Rita rancho located and patented east of the creek named Tasajara?

A. It may be—that is, I did not examine the location of the Santa Rita grant as surveyed; I did not go beyond the original title papers in making this examination.

Q. 13. Then, as a matter of fact, that call of the Santa Rita rancho was utterly disregarded in the final location of that rancho, was it?

A. I think it was.

(By Mr. MULLANY:)

Q. 14. Mr. Hopkins, are there any suggestions you wish to make in regard to the testimony you have given?

A. I would like to state that in describing the eastern boundary of the Santa Rita rancho I think I made the lands of Bartolo Pacheco lie on the north, because the call was along the Tasajara creek to the "Loma Alta" y la tierra de Bartolo Pacheco, and that would put the lands of Bartolo Pacheco on the west or wherever they might be.

By agreement of counsel for the respective parties herein the reading of all depositions to the respective witnesses taken in this suit and the signing of the same by them, respectively, are waived.

174 *Deposition of Charles Duerr.*

Examination-in-chief of CHARLES DUERR on behalf of respondents:

(By Mr. CRANE:)

Q. 1. State your name, age, place of residence, and occupation.

A. My name is Charles Duerr; my age, sixty-two years; my place

of residence, Suñol, Alameda county; and am by occupation, at present, a farmer & stock-raiser.

Q. 2. What has been your occupation during a large part of your life?

A. I was following land-surveying in the State.

Q. 3. Have you ever held any official position as land surveyor?

A. I have.

Q. 4. What time & what?

A. I was county surveyor one time in Alameda county—I think it was from 1870 to 1872—and I was a deputy United States surveyor.

Q. 5. At what time was that?

A. I think it was in 1865 or 1866, if I am not mistaken.

Q. 6. Have you ever been engaged in making surveys in the Livermore Valley?

A. I have.

Q. 7. How much?

A. Oh, I have been there for a number of years, running lines for settlers, and I have retraced one township there, and section lines, where they had difficulty in finding their corners, while I was county surveyor.

Q. 8. Have you any acquaintance with the lines or exterior boundaries of any of those grants there in the Livermore Valley?

A. I have.

175 Q. 9. Which ones?

A. I know all those grants over there—the San Ramon grant, the Santa Rita, the Las Pocitas, and the valley grants, and also the Las Cuevas.

Q. 10. Do you know the boundaries of the Las Pocitas from the calls in the original grant and decree of confirmation?

A. Yes, sir; I do.

Q. 11. What is the boundary on the north in the decree of confirmation, if you know?

A. I think it is the Rancho Las Cuevas.

Q. —. What is the boundary on the east?

A. The hills of what are called Buenos Ayres.

Q. 13. And on the west?

A. On the west it is bounded by the Santa Rita rancho.

Q. 14. Please look at that paper, "Exhibit 45," and see what the calls of the Santa Rita rancho are and please state what they are.

A. I have read the calls of the grant.

Q. 15. Are you familiar with those calls?

A. Yes, sir.

Q. 16. Can you locate them on the ground?

A. I can.

Q. 17. Please look at that map before you there, "Exhibit Hopkins," and state if you can point out upon that map the calls of the Santa Rita rancho.

A. I can.

Q. 18. Now, you may proceed and point out the calls of the Santa Rita rancho upon map Exhibit Hopkins.

Mr. HARDING: Complainant objects on the ground that the evidence sought to be elicited is incompetent, irrelevant, and immaterial, in that the boundaries and limits of the claim under the Las Pocitas grant *was* presented to the board of land commissioners, were definitely determined and fixed by the Lewis survey, made under authority of the United States in the month of May, 1854, as has been finally adjudged by the Land Office Department of the United States, and that any question pertaining thereto is now *res judicata* and the testimony is therefore incompetent.

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(Respondents agree that the above objections shall be considered as interposed to each question heretofore asked and hereafter to be asked this witness by counsel for respondents.)

A. In the first place, the grant, of which "Exhibit 45" is a translation, gives the tract of land as lying between the Tasajara creek on the east and the San Ramon grant on the west and running from the house of the San Ramon grant to the Palos Secos.

Q. 19. That is the place marked on the map, is it?

A. Yes, sir.

Q. 20. What is the next call?

A. From there in the direction of the Loma Alta. The language of the grant is as follows. I read from the translation of the grant in evidence, "Exhibit 45:" "Embraced between the arroyo or cañada (creek or ravine) of the Tasajara and the tract of San Ramon, bounded by the house of the same tract of San Ramon up to the Palos Secos, and from this point along the Tulas to the Loma Alta (high hill), by the arroyo or cañada of the said Tasajara, and by the sierra (mountain) and the tract of the citizen Bartolo Pacheco."

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Q. 21. Do you find marked upon that map, "Exhibit Hopkins," the situation of the Palos Secos?

A. Yes, sir.

Q. 22. Now, will you please trace from that point along the Tulas to the Loma Alta by the arroyo or cañada of said Tasajara, if you can?

A. The Loma Alta, in the days when this grant was settled, so far as I remember, was a matter of dispute, but it is supposed to be located in the — Mountains. That is the only explanation that would conform to that description. The bearing would be northeast from the Palos Secos until it comes in line with the Tasajara creek.

Q. 23. What is the northern boundary as called for?

A. The lands of Bartolo Pacheco.

Q. 24. Do you know anything about the location of those lands?

A. I do.

Q. 25. Are they properly located on that map, "Exhibit Hopkins?"

A. I think they are. I wouldn't swear to that. It is simply a matter of appearance, but it seems to be.

Q. 26. You are acquainted, are you not, with the natural objects there—the Tasajara creek?

Question objected to by complainant as leading.

Q. 27. State whether or not you are acquainted.

A. I am.

Q. 28. How long have you been acquainted with the Tasajara creek?

A. Between twenty & thirty years.

Q. 29. Now, sir, as a surveyor, from the calls in that grant
178 of Don Jose Dolores Pacheco, called Santa Rita, what would you consider as the eastern boundary of the grant, Santa Rita, as described in the grant itself?

A. The Tasajara creek, certainly.

Q. 30. It calls for the Tasajara creek?

A. Yes, sir; the Tasajara creek.

Q. 31. As far as the Loma Alta?

A. Yes, sir.

Q. 32. What do you say as to the locality of the Lomas de las Cuevas? What does that mean, "Lomas de las Cuevas?"

A. I think it means caves.

Q. 33. Are they correctly delineated upon that map, "Exhibit Hopkins?"

A. Yes, sir; I think they are.

Q. 34. How about the Sierra de Buenos Ayres, as to whether they are correctly marked upon that map, "Exhibit Hopkins?"

A. The topography seems to be correct on that map.

Q. 35. You have surveyed on that ground?

A. Yes, sir. I occupy a part of this Rancho Cañada de los Vaqueros, and I did in 1859.

Q. 36. Are you acquainted with the lines of the survey called the Dyer survey of the Las Pocitas, made in 1865?

A. You mean the nine-league survey?

Q. 37. Yes.

A. Yes, sir. I am.

Q. 38. Is that survey correctly delineated on that map, "Exhibit Hopkins?"

A. Well, that I couldn't swear to. Some of the lines I know are correct—the boundary between the valley rancho and the Santa Rita and the San Ramon, and also the north boundary.

Q. 39. What do you say about the east boundary?

179 A. Well, it seems to be correct; but I don't know exactly, and I wouldn't be positive whether the map is correct or not; that I couldn't swear to.

Q. 40. Now, from your experience on the ground and the time you have lived there and the observations you have made, what would you say as to the Dyer survey of 1865 being embraced by the natural exterior boundaries of the Las Pocitas grant as given in the decree of confirmation?

Mr. HARDING: We will add the further objection here that this is incompetent.

A. I think that survey is within the exterior boundaries as described in the original papers—the Buenos Ayres on the east, the Lomas de las Cuevas on the north, the Santa Rita on the west, and the Valley de San Jose on the south.

Cross-examination of CHARLES DUERR:

(By Mr. HARDING:)

Q. 1. Mr. Duerr, if the diseño or the old Spanish map of the Las Pocitas shows upon its face that the Arroyo Mocho lies just outside of its boundaries and not within the boundaries of the diseño, and this Dyer survey shows that the said Arroyo Mocho is within its boundaries, then you would qualify your opinion, would you not, as to whether or not the Dyer survey is within the exterior boundaries as shown by the diseño?

Mr. CRANE: We object to this on the ground that the question is predicated upon a fact that has not been proven; that it is not cross-examination, as nothing has been said by us about any
180 diseño, and that the question is purely hypothetical.

A. Well, of course, if the diseño shows that the Arroyo Mocho is outside, then this Dyer survey would not be right, as far as it includes a part of the creek, if any.

Q. 2. Look at the Dyer survey, Respondents' "Exhibit 29," and say how far south that survey runs from where it crosses the Arroyo Mocho.

The same objection by respondents.

A. Less than two miles. It is a three-cornered piece, and two of the sides are less than two miles in a diagonal line. It is a three-cornered piece formed by the creek.

Q. 3. How far outside of the Arroyo Mocho creek in a westerly direction does the south line of the Dyer survey run?

A. About two miles.

Q. 4. Do you know the location of the old Livermore house of Robert Livermore?

A. I believe I do.

Q. 5. How long have you known that, Mr. Duerr?

A. Well, I have known it since 1857.

Q. 6. Was Robert Livermore living there at the time you knew it?

A. No, sir; he was dead. I think he was dead.

Q. 7. You think he was dead when you first knew the house?

A. It may be that I am mistaken about it, but I have known the place since 1857.

Q. 8. How far is it from that house to the west line of the rancho as surveyed by Dyer; the nine-league survey?

A. About five miles to the nearest point.

Q. 9. About five miles west?

A. Yes, sir.

Q. 10. Now, look at the diseño contained in "Exhibit 23,"
181 and state about what part of the whole distance from the east boundary to the west boundary is the house located from the western boundary.

Mr. CRANE: We object to that question, first, on the ground that the diseño is not made according to any scale, and is not made in accordance with any survey or anything from which the witness can answer the question; and, second, that it is not cross-examination.

A. I think it is about one-sixth.

Q. 11. Now, assuming that the western line as shown by the Dyer ten-league survey is correct, and that the distance from that line easterly to the old Livermore house is five miles, how far would it be from the Livermore house, in the same proportion, to the eastern line?

A. Six times that distance; between twenty & thirty miles.

Q. 12. Would it not be just thirty miles?

A. Well, I only give it approximately, provided the proportions I have given are correct.

Q. 13. That would be thirty miles from east to west?

A. Yes, sir.

Q. 14. Now, according to this diseño, if it be thirty miles across the ranch from east to west how far would it be from north to south across it, taking the diseño as drawn to a scale?

A. The distance from north to south would be a little more than the distance from east to west.

Q. 15. That would be thirty miles north and south by thirty miles east and west. How many square miles would it contain? About how many leagues would that be?

182 A. I don't know without figuring it. Three miles square is a league, and thirty miles each way would be about one hundred leagues.

Q. 16. It would be over one hundred square leagues, wouldn't it?

A. Well, yes.

Q. 17. Are you familiar with the Santa Rita rancho, with its survey patent?

A. Yes, sir.

Q. 18. Does the Tasajara creek run through it?

A. Yes, sir; it runs through it.

Q. 19. On which side of it does the greater portion of the ranch lie, on the east or west?

A. I think the greater part of it, two-thirds of it, is located on the east side of the Tasajara creek, or it may not be two-thirds of it; I couldn't tell exactly.

Q. 20. Do you remember how much land the grant of the Las Pocitas calls for?

A. About two leagues.

Q. 21. Did you know Robert Livermore, the owner of this rancho?

A. Yes, sir.

Q. 22. An old gentleman?

A. Yes, sir; I never had any business with him. I only knew him by sight—that is all. I saw him but a few times.

Q. 23. You never officially surveyed any of these ranches, did you?

A. No, sir; I did not. I ran along the boundaries in official work.

Q. 24. Retraced some of the old lines?

A. No, sir; I resectionized some of the land there and ran some of the exterior boundaries. Those ranches were established before my time.

Q. 25. Have you ever had any experience in locating
183 Spanish grants under authority of the United States?

A. No, sir; I had no practice in the matter. I never did locate one.

Q. 26. How long since you made surveying a business?

A. I have done no surveying since 1878.

Q. 27. Do you understand Spanish?

A. I do to some extent; yes, sir.

Q. 28. What does pocitas mean?

A. Springs—small springs.

Q. 29. What does "fuenta" mean?

A. I think it is outrun a current.

Q. 30. Is not that a better word for spring than pocitas?

A. No, sir; pocitas is the word; "poso" is a spring, and pocitas is a small spring.

Q. 31. Does not "poso" rather mean a pond or pool of stagnant water?

A. Well, yes, stagnant water. It probably means more of an artificial place of water than natural.

Q. 33. What does "sanzal" mean?

A. "Sanzal" means "a willow grove." "Sance" is a willow.

Q. 34. Did you ever examine the original title papers of Las Pocitas?

A. I have seen them; yes, sir.

Q. 35. Do you recollect a call for a "sanzal"?

A. No, sir; I don't remember that; I do remember all the points. I did read those papers—nearly all of them.

Q. 36. Do you remember that the papers called for the margin of the hills instead of the summit for boundaries?

A. No, sir; I do not. I am not able to give those particulars about the description. I have a general impression about
184 what those grants call for; but as to detail, I am not able to give it.

Q. 37. It would make an enormous difference, would it not, in locating one of those ranches whether you went up to those foot-hills or whether you went up to the summits, would not it?

A. It is owing to the formation of the hills. If the ground was very sloping it would cover more ground than if the hills were abrupt.

Q. 38. Take the hills on the north of the Las Pocitas rancho,

about how far is it from where they commence at the edge of the valley northward until you reach the summit?

A. The ground, as it is now located, is completely surrounded by hills.

Q. 39. You mean the patented survey?

A. Yes, sir.

Q. 40. Now, about how far would it be from the foot of the hills on the north of the Las Pocitas to their summit where you come to the divide?

A. Well, the summit of the hills has a different bearing from the north boundary.

Q. 41. Yes; I know they are not parallel, but taking an average, say from the norther-most point of the grant due north, how far would it be from the base of those hills to the summit?

A. These are rolling hills clear over to the San Joaquin.

Q. 42. What I am getting at is the general elevation or summit of this chain of hills?

185 A. It is not farther than about a mile from this corner, the southwest corner of the Rancho Cañada de los Vaqueros, to where the water runs the other way. About a mile north of that corner there is water running easterly.

Q. 43. The southwest corner of the Rancho Cañada de los Vaqueros is, then, on the southern slope of that range of hills, as I understand it?

A. It is on the southwest slope.

Q. 44. About how far from the summit?

A. It is a hard matter to define the summit without being really on the ground, but I remember distinctly the location there, and the divide is within a mile of the southwest corner of the Rancho Cañada de los Vaqueros as patented; of course the divide varies with the configuration of the hills, and it is impossible for me to give the distance, but I think it is about a mile.

Q. 45. On an average, taking that chain of hills designated as de las Cuevas right around, and tell me how far it is from the summit to the foot.

A. That is a very hard question to answer. There are cañons running along in some directions two or three miles with a very gradual ascent, and other places again the hills come down very abrupt, and, as I said before, the water-shed varies according to the topography of the country.

Q. 46. How is it on the eastern side of the Rancho Las Pocitas, how far is it from the base to the summit of the Sierra de Buenos Ayres?

186 A. Those hills are more gradual in ascent, and from the summit of the hill to where it gets down to the hollow I think it is probably two miles or a little over.

Q. 47. Did I understand you to say that, as the grant is now finally located and patented, it is surrounded by hills?

A. Yes, sir; and by level land also.

Q. 48. Is the level land practically on the southern boundary?

A. Yes, sir; there is a good deal of it there.

Q. 49. And some on the western boundary also, is there not?

A. Corners. There are fractions of flat land on the southwest, and on the west it is upland again. On the southwest there are several fractions.

Q. 50. In the location of the Santa Rita rancho the Tasajara creek was utterly ignored as a boundary, was it not?

A. It seems so.

Q. 51. Disregarded entirely, was it not?

A. It looks that way; yes, sir.

Re-examination of CHARLES DUERR:

(BY MR. CRANE:)

Q. 1. Do you know the lands formerly occupied by M. D. Townsend?

A. I do.

Q. 2. How often have you been there?

A. I have been there a great many times.

Q. 3. At how early a period did you know of his occupation of those lands where he used to live?

A. I think Townsend moved in there in 1859 or 1860.

Q. 4. What part of the valley was that?

A. It is the southeastern part of the valley.

Q. 5. Now, assuming that the west half of section twenty-one, in township three south, range three east, was a portion
187 of those lands, what do you say about their topography? Were they level lands or not?

A. They are at the base of the hills—at the foot of the hills.

Q. 6. Were they level lands or not?

A. Yes, sir; they were level lands.

Q. 7. Now, then, how long did you know Townsend to live there on what is known as the Townsend ranch?

(Question objected to by complainant as irrelevant and immaterial.)

A. I don't remember what year he left there, but I think it was in 1864, or somewhere along there. I wouldn't say positively.

Q. 8. Do you know who succeeded to him in the occupation of those lands?

A. I think a man by the name of Joe Taylor went in there after Townsend. I think he was a renter. I don't really know who acquired title to it after Townsend left.

Q. 9. No; I didn't ask you that, but during the time you were acquainted with the occupation of those lands by Townsend and Taylor, what can you say as to their improvements? Was there any fencing on it?

(Question objected to by complainant as incompetent, irrelevant, and immaterial.)

A. Yes, sir.

Q. 10. Were those lands enclosed by a fence?

(Question objected to by complainant as leading, and withdrawn.)

188 Q. 11. To what extent were those lands fenced, if at all?

(Question objected to by complainant as leading.)

A. Probably six or eight hundred acres. Quite a tract of land was fenced in.

Q. 12. Do I understand that that amount of land was enclosed by a fence?

A. Yes, sir.

Q. 13. Now, then, what other improvements had Townsend or Taylor on the lands?

A. There was a fair dwelling-house, a barn, and other outhouses on it that are usually on a ranch.

Q. 14. When were you there last?

A. Some years ago now; perhaps ten years ago.

Q. 15. Was the same condition of things there when you were there last that there was before?

A. Well, I think some of the fences had been moved, but the buildings were there and other buildings put up.

Q. 16. A question was asked you, on cross-examination, something about the lands outside of the Arroyo Mocho. You were asked that assuming the Arroyo Mocho not to be within the boundaries of the Las Pocitas that you would exclude that amount of land from the Las Pocitas that Dyer took in on this corner. Do I understand that to be your statement?

A. According to the customs of the United States surveys the lines were rectangular lines, in conformity with section lines, but of course in some instances I would cross it perhaps, but I would conform to the creek as far as I could. I would not follow the creek as a boundary line, but would follow the section lines along the

189 creek and keep a general line following up the creek. I think that is the general rule in regard to these Spanish grants.

Q. 17. Have you had anything to do with diseños of Spanish grants as a surveyor?

A. What do you mean by that?

Q. Well, I mean whether you have been at all familiar with them.

A. Yes, sir; I have seen them.

Q. 19. Is there anything on the face of that deseño of the Las Pocitas, a copy of which forms a part of "Exhibit 23," by which a surveyor could find any line of that grant?

A. I think it is a very poor specimen of a map. Well, the east line seems to be the only one which is correct, the sierra on the east, and that is not correct. It is due north & south on the map while the range is northwest and southeast, and it runs off here with no sharp corners like that shown on the northeast corner of the diseño, and then it runs west, and the bigger part of the west side is the open valley, and here is a range of hills marked across the western side of the grant right in front of the Livermore house.

Q. 20. As a fact, from your knowledge of the topograph- of that country, is there such a range of hills as is marked on that diseño on the western side of the Rancho Las Pocitas?

A. There is a range of hills running parallel with the eastern range—just about parallel—about eleven miles west from Livermore's house.

190 Q. 21. And, as a matter of fact, those are the first hills you meet, are they not?

(Question objected — by complainant as leading, and withdrawn.)

Q. 22. Do you refer to the same house that counsel for complainant was pointing out to you on the diseño?

A. The same one.

Q. 23. Now, I ask you, Mr. Duerr, does that diseño represent the Lomas de las Cuevas correctly on the north?

A. No, sir; it does not represent it correctly. The distance from the house to the hills may be approximately correct, but the bearing of the hills is not correct.

Q. 24. What is the bearing of the hills on the ground?

A. The hills on the eastern boundary, which are called Sierra de Buenos Ayres, run northwest, and the Lomas de las Cuevas is a continuation of these same hills, and the general course of the Lomas de las Cuevas is northwest, the same as the Sierra de Buenos Ayres. It is one continuation of hills.

Q. 25. You appear to know what the location of the old Livermore house was. You say that from that location of the old Livermore house that you go westerly ten or eleven miles before you come to hills?

A. Eleven miles.

Q. 26. And the intermediate space is level ground?

A. Yes, sir; taking a westerly course.

Q. 27. From the Livermore house, going westerly to the hills, would you cross Tasajara creek?

A. Yes, sir.

Q. 28. How far from the house would you find the creek?

191 A. I think about five and a half miles.

Q. 29. How far is it from the Tasajara creek west to the hills?

A. About five miles.

Q. 30. Did I understand you to say on cross-examination that concerning this grant Las Pocitas as patented that it was surrounded by hills? Do you mean by that that the hills come up around it, and there is no level ground around it?

A. There are hills on the north & east, but on the south and west it is open. On the north the hills come down into section 31, township 2 south, range 2 east.

Q. 31. Do you know the topography of the land in section 19, township 3 south, range 3 east?

A. Yes, sir; I do.

Q. 32. What kind of land is that?

A. It is level land; not particularly level, but it — what is con-

sidered level land. The water is all running to the west, but it is considered level land.

Q. 33. What would you say as to section 17 in the same township?

A. It is similar land.

Q. 34. That whole body of land marked in there in that township is similar land—level land—is it not?

Question objected to by complain-t as leading, & withdrawn.

Q. 35. What is the general character of the land in that township?

A. The portion you have particularly enquired about is level land.

192 (Examination continued in conformity with agreement of counsel until ten o'clock to-morrow morning.)

WEDNESDAY, *March* 16*th*, 1887.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane and Mr. Mullany, of counsel for respondents.

Deposition of John W. Kottinger.

Examination-in-chief of JOHN W. KOTTINGER on behalf of respondents:

(By Mr. CRANE:)

Q. 1. State your name, age, place of residence, and occupation.

A. My name is John W. Kottinger; my age, sixty-six years; I live in Pleasonton, Alameda county, and am by occupation a farmer.

Q. 2. How long have you lived in the vicinity of Pleasonton? When did you first move in there?

A. I was living there before Pleasanton was founded. I have been living there since August, 1851.

Q. 3. Have you ever had anything to do with the Mexican grants in that vicinity by way of interest in them?

A. I had with one, "El Valle de San Jose."

Q. 4. Were you interested in that grant?

A. Yes, sir.

Q. 5. State whether or not your attention has ever been called to the location of the Las Pocitas grant, the Santa Rita, & the San Ramon.

A. It has.

(It is agreed by and between counsel for the respective parties herein that each question asked this witness by counsel for
193 respondents shall be considered as objected to by complainant as irrelevant and immaterial and incompetent upon the ground that all these questions in regard to the location, boundaries, and limits of the Las Pocitas rancho are *res judicata*, and it is understood that the same objections made to the testimony of Mr. Duerr and Mr. Hopkins shall apply to the testimony of this witness.)

Q. 6. Are you familiar with the calls of the Santa Rita grant as contained in the original grant itself?

A. I am familiar with it as far as I was acquainted with the description and with the map of the Santa Rita grant. The Santa Rita grant, as it was confirmed finally, was not as I read it in the original papers.

Q. 7. Do you mean finally confirmed or finally surveyed?

A. Finally confirmed under the final survey by the United States district court.

Q. Is that what you mean?

A. That is what I mean.

Q. Were you not mistaken about its being confirmed on a survey?

(Mr. HARDING: We object to the question as leading and as irrelevant, immaterial, & incompetent.)

Q. 10. You- answer to that question would seem to suppose that the grant was confirmed upon a survey. Do you mean that?

A. It was confirmed upon a survey and a compromise be-
194 tween the claims of the Santa Rita rancho and the El Valle rancho.

Mr. HARDING: Complainant moves to strike out the last answer of the witness as being entirely irrelevant and immaterial to any issue in this suit.

Q. 11. Do you know the locality of the Tasajara creek?

A. I do, sir.

Q. 12. Do you know the locality of the sitio of San Ramon or the house of Amador?

A. I know the locality and the confirmation of the Rancho San Ramon as it lays, and I know the locality of the house. There are two houses. Which of the two houses do you mean, the present house or the old house?

Q. 13. The old house.

A. Which was near the spring?

Q. 14. Yes.

A. I do.

Q. 15. Do you know the locality of the place called Laguna?

A. I do.

Q. 16. Do you know the locality of the place generally known as "Loma Alta?"

A. Well, I know where the Loma Alta is—that which I understood by that name on the ground and what was generally known and understood as such by the old Spanish inhabitants.

Q. 17. You do know it, then?

A. I know that location.

Q. 18. Will you please look upon the map marked "Exhibit Hopkins?" Can you point out those places there which are known as the places you have mentioned?

A. Yes, sir; I can. I find on this map Tasajara creek and Palos Secos, the Laguna which is at the place here marked "drains."
195 In following the Tasajara creek to its origin you find it comes out of the mountains; what we call the Loma Alta. That is

on that range of mountains of which the Loma Alta is the highest point. The Loma Alto must be here right next to the Mount Diablo. It is easterly from Mount Diablo.

Q. 19. Will you please mark the place where you locate the Loma Alta?

A. I would consider it at the place where the star is marked in red ink.

Q. 20. Did you know of the lands of Bartolo Pacheco?

A. I know the grant and was well acquainted with the widow of Bartolo Pacheco.

Q. 21. I wish you would point out on the map "Exhibit Hopkins" about the locality of the grant of Bartolo Pacheco.

A. It is in a northeasterly direction of the Santa Rita rancho; of course I couldn't give you the boundaries as it is on this map.

Q. 22. Well, I mean generally?

A. It is northeast from the Santa Rita rancho. It is at the place marked on this map "Bartolo Pacheco."

Q. 23. Do you know the location of the Lomas de las Cuevas?

A. I do.

Q. 24. Look at that map, "Exhibit Hopkins," and see if you can locate them there.

A. They are correctly indicated on this map, to the best of my knowledge.

Q. 25. Now, then, did you know the locality of the hills called the Sierra Buenos Ayres?

A. I know them.

Q. 26. Look on this map, "Exhibit Hopkins," and see if
196 they are correctly designated there.

A. They are correctly designated.

Q. 27. Have you any knowled-e of the surveyed lands of the Las Pocitas grant as surveyed by E. H. Dyer in 1865?

A. Well, I have seen the Dyer map, but I have never been on the place when Dyer was surveying, but I have seen the map of his survey.

Q. 28. Assuming that the survey upon this map, "Exhibit Hopkins," marked in red lines are the lines of the Dyer survey of the Las Pocitas grant, are the lands embraced by these lines within the exterior boundaries of that grant, Las Pocitas?

Mr. HARDING: We object to the question on the ground that the witness is not an expert, and on the further ground that the question assumes the very issue in this suit to be passed upon by this court, and is placing the witness in the place of the court, and that the witness has not been shown to be an expert.

A. They are, so far as I understood from Mr. Livermore; as far as I remember Mr. Livermore stating to me the lines of his grant.

Mr. HARDING: At this point complainant objects on the ground that the answer is not responsive to the question, and we move to strike out the portion already given.

(By Mr. MULLANY:)

Q. 29. Have you any more to say in answer to that question?

A. It corresponds to the map as I have seen it—the map of Mr. Dyer as far as I remember it—and I know the boundaries as I learned them from Mr. Livermore.

197 (By Mr. CRANE:)

Q. 30. Do you know the calls of the Las Pocitas grant as contained in the decree of confirmation?

A. Do you mean the final confirmation—the two-league confirmation?

Q. 31. I ask you if you understand the calls of the Las Pocitas grant as contained in the decree of confirmation made by the board of land commissioners and the district court. I am not asking about surveys. The question is, do you know the calls?

A. I do not.

Q. 32. I read from the decree of confirmation, a copy of which is contained in "Exhibit 24:" The land of which confirmation is hereby made is known as Las Pocitas, and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas; on the east by the Sierra de Buenos Ayres; on the south by the dividing line of the establishment of San Jose, and on the west by the ranch of Don Jose Dolores Pacheco. Those are the calls of the decree. Now, taking those as the calls of the decree, are the lands embraced by the survey, marked in red lines on the map, "Exhibit Hopkins," embraced within those calls as I read them from the decree?

Mr. HARDING: We object to that question on the ground that the witness has not been shown to have any sufficient knowledge to answer that question; that he has not been shown to be an expert; that he has not been shown to be a surveyor; that it has not been shown that the witness has had any experience in locating Spanish grants, and that the evidence is therefore incompetent. Complainant further objects on the ground that the question does not embrace all the calls mentioned in the decree, but only a part of them.

A. They are.

198 Mr. HARDING: We waive cross-examination.

Mr. MULLANY: I desire to ask Mr. Kottinger one or two questions in this case.

Mr. HARDING: We object to the re-examination of the witness.

Re-examination of JOHN W. KOTTINGER:

(By Mr. MULLANY:)

Q. 1. Do you know where the Sierra de Buenos Ayres are located on the ground, as a matter of fact?

A. I do, sir.

Q. 2. How long have you known their location?

Mr. HARDING: We object, first, to the witness being recalled, and, second, we object to the witness being examined by two counsel.

A. Since 1852.

Q. 3. Do you know the location of the Lomas de las Cuevas, as a matter of fact, on the ground?

A. I do, sir.

Q. 4. How long have you known their actual location on the ground?

A. Ever since that same year, 1852.

Q. 5. Do you know the location of the Tasajara creek or ravine, as a matter of fact, on the ground?

Mr. HARDING: We object on the ground that that question has been answered two or three times already.

A. I do.

Q. 6. How long have you known its location, as a fact, on the ground?

A. Since October, 1850.

Q. 7. Do you know, as a matter of fact, the southern call of the Las Pocitas grant, to wit, "the dividing line of the establishment of San Jose?"

A. I do, sir.

199 Q. 8. How long have you known that line, as a fact, on the ground?

A. Since 1850. Since the spring of 1850, when I was at the first roaco, in the month of April.

Q. 9. Now, state whether or not all the lands shown by this Dyer survey of 1865, and indicated by red lines on the map, "Exhibit Hopkins," are within those landmarks or boundaries, as you have known them on the ground since 1851 or 1852.

Mr. HARDING: We object to the question, first, because the question has been already answered twice in response to questions of Mr. Crane; secondly, on the ground that the witness is not an expert; third, because the question embraces the very issue in this suit to be passed upon by this court.

A. They are—that is, the boundaries are within the lines as I knew them on the ground.

Deposition of Rufus C. Hopkins.

Re-examination of RUFUS C. HOPKINS on behalf of respondents:

(By Mr. MULLANY:)

Q 1. Are you familiar with the exhibits or portions of the records pertaining to the titles & claims of Mexican and Spanish grants known as the diseño?

A. I am.

Q. 2. How long have you been acquainted with their nature and their effect?

A. For more than thirty years.

Q. 3. State whether the diseños made of those grants are reliable as means of description.

A. As regards course and distance, they are often very inexact and generally rude pictures of the tract attempted to be described.

200 Mr. HARDING: All this testimony is objected to as irrelevant, incompetent, and immaterial.

The WITNESS (continuing): In California in early times there were only one or two draughtsmen, or not more than that, who made very correct diseños or maps.

Q. 4. One or two draughtsmen?

A. Yes, sir; perhaps two or three.

Q. 5. In the location of grants, state what importance was placed upon the diseño, generally.

(Question objected to by complainant as incompetent.)

A. They were generally considered as explanatory of the calls of the grant, and were more or less correct, as the case might be.

Q. 6. In the locating of grants or ascertaining their boundaries, state what importance there was placed upon the diseño, relatively, and the written description of the grant contained in the grant itself.

(Question objected to by complainant as incompetent.)

A. The calls of the grant were considered more reliable—more binding.

Q. 7. That is, the written calls?

A. The written calls of the grant, if they were natural objects. If there were natural objects called for by the grant those natural objects would be regarded, although they might be improperly represented on the diseño. But little regard was paid to course and distance in drawing diseños. They were almost always made without using a scale—eye sketches.

201 Q. 8. In locating grants after confirmation or in considering grants before confirmation, please state whether the written description contained in the grant was or was not the main guide for the location of the grant.

A. It was the main guide.

Q. 9. In locating the grant Las Pocitas which, the diseño or the written description of the ground, would be the main guide?

A. The written calls or written description in the grant would be the main guide, of course. The objects called for in the grant would be the guide, although they might be incorrectly placed upon the diseño.

Q. 10. Then, although incorrectly or erroneously designated on the diseño in locating the grant, would the main reliance be placed upon the written description contained in the grant?

Mr. HARDING: We object to the question on the ground that it is leading and incompetent, irrelevant, and immaterial.

A. It would.

(By Mr. HARDING:)

Q. 11. Please look at Respondents' "Exhibit 23," which contains what purports to be a copy of the diseño of the Las Pocitas rancho, and compare it with the traced copy of the diseño which I now place in your hands and which is marked "Complainant's Exhibit K K," for the purpose of identification, and state which is the true copy of the original, if either.

A. "Exhibit K K" is the traced copy of the original diseño as found in the expediente, the diseño accompanying the peti-
202 tion for the grant. The diseño in "Exhibit 23" purports to be a copy of the original of "Exhibit K K," the original of Exhibit 23 being in the handwriting of Jose Zelon Fernandes, who at that time was secretary of state, and which original of "Exhibit 23" was delivered to the grantee at the time he received his grant, and accompanied the grant and was filed by him with the land commissioner as an exhibit.

(Examination continued in conformity with agreement of counsel until Monday, the 21st instant, at half past 10 o'clock a. m.)

MONDAY, *March 21st*, 1887.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane and Mr. Mullany, of counsel for respondents.

Deposition of Samuel B. Martin.

Examination-in-chief of SAMUEL B. MARTIN on behalf of respondents:

(By Mr. CRANE:)

Q. 1. State your name, residence, age, and occupation.

A. My name is Samuel B. Martin; my age, sixty-nine years; I live in San Francisco, and I am engaged in no regular business.

Q. 2. Have you during your lifetime been acquainted with the Spanish grant in the Livermore Valley—say the San Ramon, the Las Pocitas, and the Santa Rita and other grants?

A. Yes, sir.

Q. 3. When did you first become acquainted with those
203 lands and those grants.

A. Well, I went into that valley there, where they are situated, in 1851.

It is agreed that each question asked this witness by counsel for respondent shall be considered as objected to by complainant as incompetent, irrelevant, and immaterial, and *and* that the testimony sought to be elicited are matters *res judicata*.

Q. 4. How long a time were you acquainted with these lands, and where were you residing after that date?

A. I bought the Santa Rita rancho in March, 1855. I owned a rancho on the San Lorenzo creek, in Alameda county, near Haywards, and I resided there in 1853, and there was one or two years elapsed between that time and 1851 that I was travelling in the

southern part of the State, and in 1851 I drove, in connection with John Johnson, cattle, and we took them in to the Tasajara and Alamo streams, and in 1853 I commenced living at the San Lorenzo, and made that my home from 1853 to about 1863. In March, 1855, I purchased this Santa Rita rancho, and lived on that, too. I was back and forth between the two places from 1855 to 1880. I kept occupied both those places and had cattle on them.

Q. 5. This Santa Rita rancho referred to by you is the Santa Rita rancho in Livermore Valley, is it?

A. Yes, sir.

Q. 6. Originally granted to whom?

A. Jose Dolores Pacheco.

204 Q. 7. What was the condition of that Santa Rita claim as to title—I mean as to confirmation, as to proceedings for confirmation—at the time you purchased it?

A. It had been before the land commission and it was rejected, and it was in that condition when I purchased it.

Q. 8. What steps were taken, if any, afterwards—after you bought—in regard to it?

A. It was appealed to the United States Supreme Court.

Q. 9. Were any proceedings ever taken in the United States district court in regard to it?

A. Yes, sir; it was confirmed in the United States district court.

Q. 10. It was afterwards confirmed in the United States district court?

A. Yes, sir.

Q. 11. I want you to state, Mr. Martin, if you were well acquainted with the proceedings for the purpose of the location of that grant—the survey of that grant.

A. Oh, yes; we had a long controversy over that.

Q. 12. I wish you now to look at the map, Respondents' "Exhibit 47," at the place marked on that map Santa Rita, and which is enclosed with the yellow lines, & state whether that represents the final survey of that grant.

A. It does. I am perfectly well acquainted with it, and it does represent the final survey of that grant.

Q. 13. Now, Mr. Martin, I will read to you the calls of that grant from the translation of the original grant, "Exhibit 45:" "The tract of land embraced between the arroyo or cañada of the

205 tasajara (creek or ravine) and the tract of San Ramon, bounded by the house of the same tract of San Ramon up to the Palos Secos, and from this point along the tular to the Loma Alta (High Hill), by the arroyo or cañada of said tasajara, and by the sierra (mountains), and by the tract of Citizen Bartolo Pacheco." Are you familiar with those boundaries?

A. I am.

Q. 14. Now, then, state whether or not the tract of land which was finally located and surveyed and patented in satisfaction of the claim under the Santa Rita grant *were* located in accordance with the grant itself.

Mr. HARDING: Complainant makes the additional objection that the evidence sought to be elicited is utterly incompetent, and, further, that it is not permissible at this late day to contradict by parol testimony the adjudications of the United States district court and the United States Supreme Court, and, further, that the witness is not an expert.

A. It is not located in accordance with the calls. It is partly located in accordance with the calls and partly in accordance with the compromise that was made between myself and Antonio Sañol, Augustine Bernal, and Juan Bernal. They were the owners of the grant El Valle de San Jose.

Q. 15. Do you know why the land claimed under the Santa Rita grant was not located in accordance with the calls of that grant?

(Question objected to by complainant as incompetent and immaterial.)

206 A. I do know.

Q. State what those reasons were.

(Question objected to by complainant as incompetent and immaterial.)

A. The owners of the San Ramon rancho, Dougherty and Glaskin, about 1853, had a preliminary survey of the San Ramon rancho made, and they surveyed their land in such a way as to take in the Tasajara creek, nearly the whole Tasajara creek, and they did that because it was a very valuable stream for water for their cattle. The cattle business was a business that was followed by the people there at that time, and by taking in that creek they cut the Santa Rito rancho entirely in two.

Mr. HARDING: I would like to have it noted that the witness is testifying with the map, "Exhibit 47," spread before him.

The WITNESS (continuing): The portion of the Santa Rita rancho bounded on the west by the house, by the "sitio" of the Amador, and the San Jose Mountains—that was all on the west, and that was properly located in accordance with the calls of the grant; but, as I said before, these gentlemen, the owners of the San Ramon rancho, in making their preliminary survey, cut the Santa Rita entirely in two by including the said Tasajara creek in their preliminary survey. I suppose the east line of the Amador rancho must be five miles long; that was the reason that it was located differently. On the west side of the Tasajara creek the Santa Rita was prop-

207 erly located, but I had a preliminary survey made of the Santa Rita, and I took land enough to satisfy the quantity called for by the grant, and a portion of that land was a part of the Rancho El Valle de San Jose.

I had a preliminary survey of the Santa Rita rancho made, I think, about 1859; it might have been a year earlier or a year later.

Q. 17. You state that it was a preliminary survey. Now, was there anything else done except the preliminary survey made of the San Ramon?

A. I think it was done under orders of the surveyor general's office, but I have not examined to see.

Q. 18. No- I ask you if there was a final survey made of the San Ramon, which finally went to patent?

A. The survey of 1853, which I have called a preliminary survey, was finally confirmed & went to patent. I rather think that is so.

Q. 19. Look upon "Exhibit 47" and state whether the place marked "San Ramon," and which is embraced by bluish lines, properly marks the survey of the San Ramon as patented.

A. It does.

Q. 20. You say the survey of the Santa Rita was made about 1859?

A. Yes; about that. Maybe it was within a year or so either way. It was patented in 1865.

Q. 21. I will ask you whether you have already stated that the easterly boundary of the Santa Rita rancho, as finally surveyed and patented, is further to the east than was called for by the grant?

A. Yes, sir.

Q. 22. And I think you have already stated that that sur-
208 vey or location was made upon a compromise between yourself and the owners of the El Valle de San Jose rancho?

(Question objected to be complainant as leading, and withdrawn.)

Mr. CRANE: I now introduce in evidence copy, duly certified by the clerk of the United States district court of the district of California, of a paper entitled "United States *vs.* John Youtz, administrator of the estate of Jose Dolores Pacheco, which purports to contain articles of *of* agreement in reference to the survey and location of the Santa Rita rancho, signed by Antonio Suñol, John Bernal, Augustine Bernal, and Samuel B. Martin. It also embraces the order of the United States district court confirming the survey made in accordance with that agreement. "Marked Respondents' Exhibit 48."

(Objected to by complainant as incomp-tent, irrel*l*evant, and immaterial.)

Q. 23. Does that paper, "Exhibit 48," which is endorsed "decree ordering new survey," constitute the agreement & compromise and the order of the court confirming the lines, as you had compromised them, as you had agreed on?

A. Yes, sir; it does.

Q. 24. Now, then, Mr. Martin, it appears by inspection of the map (Exhibit 47) that in the final location of the Santa Rita rancho there were lands taken to the eastward, you say, further than called for by the original grant. Now, please look upon this "Exhibit 47" and explain what the nature of that compromise was with the
209 owners of the El Valle de San Jose rancho.

(Question objected to by complainant as irrel*l*evant and immaterial.)

A. I allowed them to take seventeen hundred acres of land around

the water and within the space represented by the fog in the southern boundary of the Santa Rita rancho and a portion further south, the whole amounting to seventeen hundred acres. I had already surveyed the high lands on the east of *of* the Tasajara creek out to the eastward end of the survey, and by giving them this land they became reconciled to yielding that to me without any trouble. In the northern portion of the Santa Rita rancho, east of the Rancho San Ramon, twelve hundred & eighty acres were included that were not in the first survey of the Santa Rita rancho. There were also some little corners taken off; given and taken. The land which I conceded to them was what the Spaniards called the "Bolsa," and had the water for two or three miles.

Q. 25. Now, Mr. Martin, look at "Exhibit 47" and state whether the line of the Tasajara creek is correctly delineated thereon.

A. Oh, yes; I have looked at it and it is the same in all the surveys as it is laid down here. The line of the Tasajara creek starts at the upper edge of the Santa Rita rancho, near the centre of the rancho, and the line of the creek runs northerly through the eastern portion of the San Ramon rancho.

Q. 26. You were well acquainted in that country in 1865, were you not, and a good many years afterwards?

210 A. Yes; and a good many years before.

Q. 27. Look at the map, "Exhibit 47," and state whether you know what the red lines embracing the words Las Pocitas represent.

A. Those lines represent the survey made by Dyer in 1865, I think, of the Las Pocitas rancho to out-boundaries.

Q. 28. During the time you have lived in the Livermore Valley did you become acquainted with the calls of the Las Pocitas and their location on the ground?

A. I did. After I purchased the Santa Rita rancho I became acquainted with the calls of the Las Pocitas rancho.

Q. 29. In the final decree of confirmation of the Las Pocitas rancho it calls for the Lomas de las Cuevas on the north, for the Sierra de Buenos Ayres on the east, for the dividing line of the establishment of San Jose on the south, and for the lands or rancho of Don Jose Dolores Pacheco on the west. Now look upon that map, "Exhibit 47," and state whether or not the lines of the Dyer survey are within those calls.

(Question objected to be complainant on the ground that it is incompetent, irrelevant, and immaterial, and that the witness is not an expert.)

A. It is within those calls.

Mr. CRANE: In this connection I introduce in evidence a certified copy of the mandate of the supreme court, which mandate contains a copy of the final decree of confirmation in the case of the

211 proceedings for the confirmation of the Santa Rita grant, and I introduce this paper for only one purpose: It contains a copy of the final decree of confirmation, which decree of confirma-

tion does not describe the grant, but refers to the grant itself for a description, and it is for that purpose alone that I introduce this paper. Marked Respondents' Exhibit 49.

Objected to by complainant as irrelevant and immaterial.

Cross-examination of SAMUEL B. MARTIN:

(By Mr. HARDING:)

Q. 1. Is it not a fact that in the compromise you made with the owners of the San Jose rancho, Suñol and the Bernals, that this chimney-shaped piece of the El Valle de San Jose on the extreme northern portion, lying a mile and a quarter north and a mile and a quarter west of the old oak tree known as the "Livermore oak," is not that the land or a portion of it that you swapped to the owners of the El Valle de San Jose for other portions of the Santa Rita rancho?

A. I never had anything to do with that land and never owned an inch of it; that chimney you refer to.

Q. 2. From whom did you buy your land on the Santa Rita rancho?

A. I bought it from Augustine Alviso and also from the widow of Jose Dolores Pacheco.

Q. 3. Do you know the Livermore oak tree?

A. Yes, sir.

Q. 4. Did you know Augustine Alviso, the owner of the Santa Rita rancho, in 1854?

212 A. I knew him, but not in 1854.

Q. 5. Were you acquainted with that country in 1854?

A. Yes, sir; and before that.

Q. 6. Did you know Robert Livermore in the year 1854?

A. Yes, sir.

Q. 7. He was the owner of the Las Pocitas rancho at that time, was he not?

A. Yes, sir.

Q. 8. The exclusive owner?

A. He was.

Q. 9. And the two Bernals and Suñol were the owners of the El Valle de San Jose rancho?

A. Yes, sir.

Q. 10. Juan Bernal was one of the owners, was he not?

A. Yes, sir.

Q. 11. And Augustine Alviso was the owner of the Santa Rita rancho in 1854, was he not?

A. I think so, but I don't know.

Q. 12. Were you not in that neighborhood in the month of May, 1854?

A. No, sir.

Q. 13. Are you aware of the fact that Robert Livermore and Augustine Alviso and Juan Bernal had their lines located there in 1854 by the United States surveyor?

(Question objected to by respondents as not being cross-examination, and as irrelevant and incompetent to any issue in this suit.)

A. I know nothing of it except by rumor.

Q. 14. Do you know the old Livermore oak tree?

A. I do.

Q. 15. How long have you known that tree?

A. Well, I don't think I knew that tree before 1855.

Q. 16. You were never there before 1855?

213 A. Yes; I was there in 1851.

Q. 17. But you didn't know the Livermore tree before 1855?

A. Well, I don't think I did; I don't think it was hardly that soon.

Q. 18. You say you are acquainted with the boundaries of the Las Pocitas rancho?

A. Yes, sir.

Q. 19. Do you know the southern boundary of that rancho, "the dividing line of the establishment of San Jose?"

A. I could explain how I know it—no man know- it.

Q. 20. No man knows it? You said you knew it.

A. I understand it as it is called for in that grant.

Q. 21. When did you first know it?

A. I suppose as early as 1860, anyhow; it may have been earlier.

Q. 22. Was it marked on the ground?

A. I never saw it marked on the ground.

Q. 23. Did you see any marks to indicate its location?

A. No, sir; I never saw any marks.

Q. 24. Then how do you know where it is?

A. Well, I knew that in some way or other.

Q. 25. Explain how you know where it is, if you never saw any marks to indicate its location.

A. I have read all those different grants. The south boundary of Amador grant had a call for the known boundaries of the San Jose. Each grant there took a portion of the ground belonging to the mission.

Q. 26. I am asking you about the southern boundary of the Las Pocitas. Confine yourself to that, and state how you know

214 its location.

A. Well, it has been pointed out to me by a great many persons over there.

Q. 27. Where William J. Lewis surveyed it?

A. It was surveyed by a number of persons. It was surveyed by John La Crose.

Q. 28. Did he ever survey it at a different place from William J. Lewis?

A. There has been a great many changes from that survey of Lewis'.

Q. 29. What change do you know of having been made in the boundaries of the San Jose rancho from the survey of William J. Lewis in 1854?

A. It was not my rancho and I don't know the boundaries of that rancho, but I have been in the country, and they were pointed out to me by La Crose; he surveyed my rancho and was a deputy United States surveyor, and he did my work; he aided me in running the lines of my rancho and he aided me throug-out in comprom-sing there every way.

Q. 30. You say you know the northern boundary line of the Valle de San Jose rancho?

A. Yes, sir. I know pretty near it. I don't know it, but I could go on the ground and show it to you.

Q. 31. Where is the east end of the north line of the Rancho el Valle de San Jose located and how is it marked?

(Question objected to by respondents as immaterial and irrelevant and as not cross-examination.)

215 A. I have not informed myself particularly. I know it on the map here.

Q. 32. You know it on paper, but not on the ground?

A. Well, I have been on the ground, but I don't know the section it is on, and how can I describe it.

Q. 33. The northeast corner of the San Jose ranch is a noted corner. Why can't you locate it?

A. I don't know the northeast corner.

Q. —. Don't you know that it is marked by a large heap of stones in the centre of the Arroyo Mocho?

A. I don't know.

Q. 35. You never heard of that before?

A. Well, I think I have heard of almost everything that is over there, but you know it is an odd question to ask me now, when it must be fifteen or twenty or twenty-five years, maybe, since I knew that heap of stones.

Q. 36. How many acres did you get east of the Tasajara in the Santa Rita rancho?

A. Well, I suppose about half the rancho was on the east of the Tasajara.

Q. 37. How much was that?

A. Well, I suppose it is about four thousand acres.

Q. 38. Four thousand acres east of the Tasajara?

A. Yes, sir.

Q. 39. And for that four thousand acres you gave seventeen hundred acres in exchange?

A. In the Bolsa; yes. That was land that was not regarded by those people as being worth more than one acre of the Bolsa to
216 ten acres of the high ground. These Bolsa lands, with this water on it, was thought to be worth about one acre of the Bolsa land to ten of the higher ground. Out there that was dry which lay east of the Tasajara.

Q. 40. Look at this chimney-shaped piece in the northern part of the San Jose rancho, embracing about one thousand acres, and say whether or not that is not as valuable land as any in that neighborhood.

A. No, sir; it is not.

Q. 41. Could you get it for less than one hundred dollars an acre to-day?

A. Well, I wouldn't give fifty dollars an acre for it to-day.

Q. 42. Are you interested in the result of this suit?

A. Not in the slightest degree. I am not interested to the amount of a dollar.

Q. 43. Is your brother interested, J. West Martin?

A. My brother is one of the defendants in this suit, and he is interested, of course.

Q. 44. Where is that preliminary survey that you had made in 1859 of the Santa Rita rancho, as you have testified?

A. There was a survey made, and I said already that whether it was made by order of the Land Office or the surveyor general's office or not I can't very well remember.

Q. 45. Who made it?

A. John La Crose.

Q. 46. Did he make it?

A. He made it.

Q. 47. In 1859?

A. I said about that time.

217 Q. 48. Was that the first survey of the Santa Rita rancho that you knew of?

A. That is what I said—that it was the first survey.

Q. 49. If John La Crose made it I can find it. Do you know where that survey is?

A. I don't know where that survey is. I don't know where any of the papers are. A copy of that map must be in surveyor general's office.

Mr. CRANE: I now introduce in evidence a copy, certified by the acting Secretary of the Interior, of a letter of the Secretary of the Interior, addressed to the Attorney General of the United States, dated at Washington, December 6th, 1882, requesting the Attorney General of the United States to bring this suit.

Marked "Respondents' Exhibit 50."

I also introduce in evidence an agreed copy of a letter from the Attorney General of the United States to the United States district attorney at San Francisco, California, directing this suit to be brought, which letter is dated February 21st, 1883.

Marked "Respondents' Exhibit 51."

I also introduce in evidence a copy, certified by the clerk of the United States circuit court for the district of California, of a bond dated July 20th, 1883, and purporting to be given by William B. Carr, of the city and county of San Francisco, with two sureties, purporting to indemnify the United States against any cost in the prosecution of this action.

218 (Marked "Respondents' Exhibit 52.")

Respondent- rests.

Examination continued, in conformity with agreement of counsel, until Wednesday, the 23rd inst., at half past 10 o'clock a. m.

WEDNESDAY, *March 23rd*, 1887.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane and Mr. Mullany, of counsel for respondents.

(It is admitted by both complainant and respondents that John La Crose, the surveyor mentioned by Mr. Samuel B. Martin in his testimony, died in October, 1880, in Trinity county, California.)

Deposition of Sam'l B. Martin.

Mr. SAMUEL B. MARTIN: In my testimony the other day I spoke of the La Crose survey of the Santa Rita rancho as a preliminary survey, but upon reflection and after considering the matter and without consultation with any papers I am entirely satisfied that it was not a preliminary survey, but a survey that was ordered by the United States surveyor general for California—Mandeville. The eastern line of the La Crose survey of the Santa Rita rancho and the eastern line in the Dyer survey were practically the same; very little difference. The eastern line of one survey went as far as the eastern line of the other survey. There was no difference in the ex-
219 treme easterly line of the La Crose survey and the easterly line as patented.

Introduction of Exhibits in Evidence.

Mr. HARDING: Complainant, in order to meet that part of the defense pertaining to the Las Pocitas rancho, introduces in evidence copy, duly certified by the United States surveyor general for California, of the instructions issued by John C. Hays, United States surveyor general for California, to William J. Lewis, deputy United States surveyor, dated April 5th, 1854, which instructions recite the descriptive portion of the decree of confirmation of the board of land commissioners confirming the claim to the Las Pocitas rancho, and directing said United States deputy surveyor to make a careful and accurate survey in accordance with that decree.

Marked "Complainant's Exhibit B B."

Mr. CRANE: On behalf of the defendants this piece of evidence and all evidence concerning the survey of the Las Pocitas rancho by Mr. William J. Lewis, generally called the "Lewis survey," is objected to—first, upon the ground that it already appears that the grant of the Las Pocitas was not confirmed by the board of land commissioners until the 4th day of February, 1854, and that it also appears that no final confirmation of this grant was had under the laws of the United States until the year 1860, and that this so-called Lewis survey was not and could not have been an official survey of said grant, and no power or authority existed in the United States surveyor general for California to order such survey or to make one.

Mr. MULLANY: I will add to the objections made by my
220 learned associate that it appears upon the face of the paper now introduced in evidence that it is an instruction to make a preliminary survey, and that the making thereof should be at the expense of private parties without designating who those private parties might be, and that it is, therefore, not an official survey; and, furthermore, that at the date at which this paper was made or written by the officer purporting to have signed it there was no authority of law for the making of any preliminary survey or of any survey whatever of the Rancho Las Pocitas; thirdly, there was no order or instructions or authorization from any source, official or otherwise, for the making of this survey, which authority or source had the power at that time to make the order thereof, and that it is incompetent, irrelevant, and immaterial.

Mr. HARDING: Complainant next introduces in evidence, in connection with the last document introduced, a copy, duly certified by the United States surveyor general for California, of the survey ordered made in the last document introduced, which embraces the field-notes, the report, affidavits, tabling, notice to adjoining owners of grant, general observations of the surveyor, and the approval of all thereof by the United States surveyor general for California, John C. Hays, which document recites as follows: "Field-notes of the survey of the Rancho de Las Pocitas, May 5th, 1854. Juan Bernal, claiming land in company with Antonio Sañol and Augustine Bernal adjoining the Rancho de Las Pocitas on the west, came to the house of Robert Livermore, and he, the said Livermore"——

Mr. CRANE (interrupting): I object to the counsel reading those special detached portions of this paper introduced in evi-
221 dence. I have no objection to counsel calling the attention of the court to any particular portion of the document, but I do object to his reading these detached portions and placing the same upon the record.

Mr. HARDING: My object in doing this is to lessen as much as possible the work of the court.

(Continuing reading:) "Myself and others went to an oak tree about $\frac{5}{8}$ths of a mile to the westward of Livermore's house, which said Livermore claimed as a corner. He also pointed out a line running from thence touching the eastern side of the Arroyo Mocho as the western boundary claimed by him, being the former eastern boundary of the establishment or mission of San Jose. Juan Bernal stated that he was satisfied with the position of said corner and line;" all of which appears on page 1 of this exhibit.

Now, on pages four & five of this exhibit appears the following: "Boundary adjoining rancho of Don Jose Dolores Pacheco, Monday, May 8th, 1854. Augustine Alviso, the present owner of the rancho granted to Jose Dolores Pacheco, having been previously notified by me in writing, appeared and pointed out a line running from the oak marked R. L. 1 towards a chimezal on the Golgonès range in a course N. 2° 50′ W. as the boundary between his land and that of Robert Livermore, in which the latter concurred." I will also call the attention of the court to pages 7, 8, 9, 10, 13, and particularly to

page- 21, 22, & 23, and also to pages 31 & 32, containing the approval of the surveyor general, which recites as follows: "In their
222 decree they state the quantity to be two square leagues, a little more or less, but the specific quantity actually found within the boundaries mentioned in the said decree is four square leagues, three thousand four hundred eighty-five acres & $\frac{59}{100}$." Marked "Complainant's Exhibit C C."

Mr. CRANE: The defendants now move to strike out all the evidence contained in "Exhibit C C" as to the statements made by Mr. Livermore or any other persons on the ground, first, that it is hearesay and not the best evidence of what was said, and, second, that none of the defendants in this action are claiming under or in any privity with Mr. Livermore or any of the persons named in this exhibit.

Mr. MULLANY: I object to the entire document introduced in evidence, and especially to the portions of it which counsel for complainant has seen fit either to read or call the attention of the court to, on the ground that it is irellevant, incompetent, and immaterial, particularly in this: that the matters and things therein mentioned and proceedings therein referred to were unauthorized by law or by any authority or by authority of any officer acting under authority of law; that the very orders, such as they were, under which it was made have been utterly disregarded by Mr. William J. Lewis, as shown in this report, in this: that the orders directed him to follow the description contained in the decree of confirmation made by the board of land commissioners prior to giving the order, and
223 that this report, such as it is, does not pretend or purport to have followed these instructions or that description, and that all statements contained herein as to his giving notice to parties or persons & as to what such parties or persons did or said, whether actively, passively, or by silence, are entirely immaterial and incompetent and are not any legitimate part of a surveyor's or United States surveyor's duties or of the field-notes of a survey or a report in connection therewith in any case whatever; and, further, that no foundation has been laid for the introduction of any such statement.

Mr. HARDING: Complainant next introduces in evidence the map refer-ed to in the last document introduced as accompanying the same, which map is a duly certified copy of the original by the United States surveyor general for California. Marked "Complainants' Exhibit D D."

Mr. CRANE: The defendants object to the introduction of this "Exhibit D D," the map of the Lewis survey, so called, first, on the ground that it is not official, never having been approved by any officer of the United States, and has *has* never been referred — or used in any manner whatever in the subsequent proceedings for confirmation of the grant Las Pocitas or in the course or for the location of the ground or land claimed under said grant; that it was never recognized by any authority, State or national, judicial or executive, up to the time that the Las Pocitas was finally surveyed and pat-

ented, and that it is immaterial, incompetent, and irrelevant
224 to any issue in this suit.

Mr. HARDING: Gentlemen, will you admit of record that Robert Livermore was the sole owner of the Las Pocitas rancho at the time of the making of the Lewis survey, in 1854?

Mr. CRANE: Yes; we will.

Mr. MULLANY: We do.

(It is also admitted by counsel for the respective parties herein that said Livermore was the sole owner of said Rancho Las Pocitas from the 7th day of March, 1853, up to the time of his death, in the year 1858, when he died intestate.)

Deposition of J. H. Wildes.

Examination-in-chief of J. H. WILDES on behalf of complainant:

(By Mr. HARDING:)

Q. 1. State your name, age, place of residence, and occupation.

A. My name is J. H. Wildes; my age, fifty-nine years; I live in Oakland, Alameda county, California, and I am by occupation a draughtsman in the office of the United States surveyor general for California.

Q. 2. How long have you been connected with the office of the United States surveyor general for California?

A. It will be twenty-eight years in September next.

Q. 3. In what capacity?

A. I was, in the first instance, assistant draughtsman for about four years, and afterwards became chief draughtsman, which position I held for nineteen years, and upon the accession of Mr. Brown to the office of United States surveyor general for California and
225 during his incumbency and of General Hammond, the present incumbent, Mr. Maurau was made chief draughtsman, and since then I have been a draughtsman in the office.

Q. 4. Please look at this map now shown you, which is known as Proffessor Whitney's geological map of the region adjacent to the Bay of San Francisco, made in 1867, and state whether you have placed any work upon that map; and, if so, what.

A. I have. I placed upon that map the plat of the Lewis survey of the Las Pocitas rancho.

Q. 5. How is it indicated thereon?

A. It is indicated by red boundary lines.

Q. 6. By anything else except the red boundary lines?

A. I also put the words Lewis survey within the tract so marked.

Q. 7. Was that work done correctly?

A. As correctly as I could do it from the data furnished.

Q. 8. Do you recognize that map as being a standard map or authority?

(Question objected to by respondents as leading & as incompetent and immaterial.)

A. I do.

Q. 9. To what data do you refer from which you platted this Lewis survey on that map?

A. I used the original map of the Lewis survey, of which Exhibit D D is a copy.

Q. 10. In the surveyor general's office?

A. Yes, sir.

Q. 11. Please examine "Respondents' Exhibit 47," that
226 portion covering the Livermore Valley and the surrounding country, and state whether or not, in your judgment, said "Exhibit 47" is or is not copied from said Whitney map, so far as the lines of Mexican grants in Livermore Valley and adjacent country are shown on each of said maps.

Mr. MULLANY: We object to the question on the ground that it is incompetent, irrelevant, and immaterial, and that it does not call for testimony as to a fact or facts, and that as to the question of the judgment of the witness the maps themselves speak on their faces of their contents, and the judgment of the witness is incompetent and immaterial in regard thereto.

A. It is, in my judgment, copied from the Whitney map.

Mr. HARDING: Complainant now introduces in evidence said Whitney map, dated in 1867, and especially that portion referred to which is marked as the Lewis survey. (Marked Complainant's Exhibit E E.)

Mr. MULLANY: We object to this map being placed in evidence on the ground that it is incompetent, irrelevant, and immaterial, and it is confessedly not a copy of the map originally made by Professor Whitney, but is a map as originally made but defaced and prepared for this action by the witness.

Cross-examination of J. H. WILDES:

(By Mr. CRANE:)

Q. 1. Please look upon "Exhibit E E" and state whether the lines of the survey of the Las Pocitas rancho, known as the Dyer survey made in 1865, are delineated thereon?

A. They are.

227 Q. 2. In what manner?

A. By small uncolored lines, within which are printed the words "Las Pocitas."

Q. 3. Does one of those lines appear to be a common line between the Las Pocitas rancho and the Rancho Cañada de los Vaqueros?

A. Yes; it does so appear.

Q. 4. Does one of the western lines of the Dyer survey of the Las Pocitas rancho appear on this map to be a common line between the Las Pocitas grant and the grant marked San Ramon?

A. It does.

Mr. MULLANY: I will ask one or two questions of the witness.

Q. 5. Was there any line or indication on that map, Exhibit E E, in its original condition, as draughted or prepared by Proffessor Whitney, as to the lines or existence of the Lewis survey, so called?

A. To the best of my belief and recollection, there was not.

Q. 6. Then the lines or indications placed upon that map of the Lewis survey were entirely placed there by you—such as it is now?

A. The present lines; yes, sir.

Q. 7. Now, as it originally stood the Dyer survey of 1865 was and is now located on that map?

A. Was and now is; yes, sir.

Q. 8. How did you come to draw these dark, heavy indications or lines upon that map to designate the Lewis survey?

A. Simply as a matter of taste, and in case I was ever called
228 upon any time to show the lines of the Lewis survey I could do so.

Q. 9. Who requested you to do that?

A. I was directed to do so by the United States surveyor general's office.

Q. 10. How long ago?

A. About three months ago.

Q. 11. Did they state why you were required to do so?

A. No, sir; no reasons were given.

(By Mr. HARDING:)

Q. 12. What is the character of this map, Exhibit E E?

A. Well, it is a map that I should feel very confident Prof. Whitney would not put his name to unless it was entirely correct. It is the result of a great deal of investigation from Prof. Whitney's own surveys and coast surveys, and I think it is the most reliable map of its nature we have.

Q. 13. It is a topographical map of the country it represents?

A. Yes; it is.

Q. 14. Is it a standard authority?

A. It is so considered, I believe. I should admit it to be.

(By Mr. CRANE:)

Q. 14. Do you know of your own knowledge anything of the topography in and about this survey—the Lewis survey?

A. I do not; except from the maps on file in the surveyor general's office. I have never been in the Livermore Valley.

Mr. HARDING: Complainant introduces in evidence a compiled map from the office of the United States surveyor general for California, certified under the hand of the surveyor general and the seal of said office on the 28th of January, 1887, which said com-
229 piled map shows, first, that it is correctly compiled from the official record of the surveyor general's office; that the black boundary line delineated thereon shows the plat of the Lewis survey in 1854; that the red boundary line represents the so-called Dyer survey made in 1865; that the blue boundary line represents the official final survey of the Las Pocitas rancho, made in March, 1869,

on which patent issued for said rancho; that the brown-colored tracts show the lands in litigation in this suit; that the protracted black lines show the partial boundaries of the Rancho Santa Rita, the Rancho el Valle de San Jose, the Rancho San Ramon, and the Rancho Cañada de los Vaqueras, the range of the Lomas de las Cuevas, the Sierra de Buenos Ayres, the Arroyo Mocho creek, at the southeast corner of the map, as marked on the diseño of the Las Pocitas rancho; the ranch-house of Robert Livermore, the northeast line of the Rancho el Valle de San José, which appears to be a common line as established by Lewis and afterwards followed by the official survey of the said Rancho San José for a distance of about four miles, marked "Complainant's Exhibit F F."

Mr. MULLANY: We object to this diagram or map being put in evidence on the ground that it is incompetent, irrelevant, and immaterial, and that in view of the official document placed in evidence here and the official maps it is not what the United States surveyor general asserts it to be by what is written on the face of it, to wit, a complete map of the official surveys, and it is not designated by said official what surveys it is compiled from;
230 and we also object on the ground that it does not accord with the official surveys and maps here now or correctly delineate or exhibit the true lines of the grant Las Pocitas as finally confirmed and patented, and particularly in this: that a considerable portion of said grant as so finally confirmed & patented lies outside of the lines of the preliminary survey of said Lewis, and, furthermore, that it does not correctly exhibit or show the location of the Sierra de Buenos Ayres, nor of the Lomas de las Cuevas, nor of the rancho of Don Jose Dolores Pacheco, as taken in connection with the location of the Rancho Las Pocitas or as the same was originally granted and described in said grant, and that, according to said official maps or surveys or diagrams now in evidence in this cause, none of the topography presented or exhibited upon this diagram is correct, and that it is a map which is not authorized by any law or authorized to be made by any officer, and that the statement contained on the face of it is not the statement of any officer in his official capacity, and is a mere statement upon which the defendants in this case, even assuming that it was a correct & authenticated or authorized statement, would have a right to cross-examine the author of it, which right is not given in this case, and therefore we reserve a motion to strike out this map upon the ground that it is incompetent, irrelevant, and immaterial, not being accompanied with any showing or data which would entitle it to be received in evidence.

231 Mr. HARDING: Complainant now introduces in evidence an agreed copy of the decision of Register Rollins, register of the United States land office at San Francisco, in the case of Arthur St. Clair *et al. vs.* The Western Pacific Railroad Company, dated November 11th, 1872, which shows, as we claim, what lands were in controversy in that case, and which include all or nearly all the lands in controversy in this suit and a number of the plaintiffs therein, aggregating one hundred and twenty, and wherein the sole

question examined and determined was the true location of the exterior boundaries of the claim under the grant of the Las Pocitas rancho, which was found and decided to be marked on the ground by the Lewis survey, already in evidence in this suit, and adjudging that the odd-numbered sections outside of said Lewis survey should pass to the said railroad company, and were awarded to it accordingly under its grant of public lands, and which document is introduced in evidence as pertinent to the issues in this suit. (Marked "Complainant's Exhibit G G.")

Mr. CRANE: I object to the introduction of this document in evidence on the ground that it is immaterial, irrelevant, and incompetent to any issue in this suit or against any of these defendants in this suit, for the reason that it purports to be a decision by one of the officers of the local United States land office at San Francisco upon a matter in which none of these defendants were parties or privies to any of the parties in that proceeding, and that it
232 appears upon the face of the document that at the time it purports to have been made—that is, November, 1872—the Rancho Las Pocitas had been not only finally surveyed and confirmed but had been actually patented to the claimant to the extent to which it was segregated and finally surveyed; and that the register of the United States land office had no authority to act in the matter of the location of the original lines of that grant, that being a matter especially delegated by law to the United States land commission and to the United States district court and the United States surveyor general for California under their instructions and judgment, and that this paper purports on its face to overrule the decision of the United States district court as to the exterior boundaries of the grant, and adopt an old preliminary survey that had been made without authority of law and which does not mark any one of the exterior boundaries of that grant.

Mr. HARDING: Complainant next introduces in evidence, in connection with the last document, the decision of the Commissioner of the General Land Office in the case of Arthur St. Clair *et al. vs.* The Western Pacific Railroad Company, dated "Department of the Interior, Washington D. C., May 3rd, 1873," which decision reviews and affirms the decision of Register Rollins, Exhibit G G.

Marked "Complainant's Exhibit H H."

The same objection by respondents as interposed to Complainant's Exhibit G G.

Mr. HARDING: Complainant next introduces in evidence the appeal by the plaintiff in said case of Arthur St. Clair *et al. vs.*
233 The Western Pacific Railroad Company from the decision last introduced in evidence, "Exhibit H H," which appeal appears upon its face to have been duly served and filed on the 7th day of July, 1873. This document is introduced in evidence simply for the purpose of showing that an appeal was taken by the plaintiff in said suit to the Secretary of the Interior from said decision of the Commissioner, "Exhibit H H," and to show that the questions now raised by the defendants in this branch of their de-

fense were all raised and passed upon in that case of Arthur St. Clair *et al. vs.* The Western Pacific Railroad Company.

Marked "Complainant's Exhibit I I."

Respondents maks the same objection as was interposed to "Exhibit G G."

Mr. HARDING: Complainant next introduced in evidence the decision of the Hon. Secretary of the Interior in said case of Arthur St. Clair *et al. vs.* The Western Pacific Railroad Company, dated November 25th 1875, which decision affirms the decision of the Hon. Commissioner of the General Land Office.

Marked Complainant's Exhibit J J."

(Respondents make the same objection as was interposed to "Exhibit G G.")

Mr. HARDING: Complainant next introduces in evidence a traced copy of the diseño heretofore referred to & marked Complainant's "Exhibit K K," being diseño or map contained in espediente No. 129, entitled "espediente instituted by the citizens, Jose Horiega & Robert Livermore, soliciting the place named Las Pocitas, of the valley of San Jose, which said diseño is the original of which map C, filed in case No. 77, Jose Horiego and Robert Livermore, Las Pocitas, purports to be a copy.

234 The purpose of the introduction of this paper is to show that one of the calls or landmarks of diseño, namely the Arroyo Mocho, at the southeast corner of the grant, is entirely omitted from the defendants' diseño heretofore offered in evidence and marked "Exhibit 46," and also for the purpose of correcting other mistakes and imperfections of said copy of a copy of said diseño introduced in evidence by defendants.

Marked "Complainant's Exhibit K K."

Examination continued, at the request of complainant's counsel, to the office of the register of the United States land office at San Francisco, until Saturday the 26th instant, at 10 o'clock a. m.

OFFICE OF THE REGISTER OF THE
UNITED STATES LAND OFFICE,
SATURDAY, *March 26th*, 1887.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane & Mr. Martin, of counsel for respondents.

Deposition of Charles H. Chamberlain.

Examination-in-chief of CHARLES H. CHAMBERLAIN on behalf of complainants:

(By Mr. HARDING:)

Q. 1. You were formerly connected with the United States land office at San Francisco?

A. Yes, sir.

Q. 2. In what capacity?

A. Receiver.

Q. 3. When did you enter upon the duties of the office of receiver?

A. Either the 6th or 7th of September, 1866.

Q. 4. And how long did you continue in the office as receiver?

A. Continuously up to October, 1885.

Q. 6. Who was register during the time you were receiver?

235 A. J. W. Shanklin, who previous to that time was receiver, became register at the same time that I became receiver. He was succeeded as register by H. G. Rollin, and he by W. R. Wheaton.

Q. 7. I will ask you what the practice was under your administration of that office in regard to receiving indemnity school selections for unsurveyed land?

(Question objected — by respondent for the reason that none of the selections in controversy in this case were made during the time that the witness was receiver.)

A. There have never been any received on unsurveyed lands duringmy time.

Q. 8. Were there any offers of such?

A. I think not. The reception of those State selections belongs more especially to the register. The receiver only connects himself with them when any contest may arise, or in collecting fees for them.

Q. 9. I wish to call your attention to the third section of the act of Congress approved July 23rd, 1866, entitled "An act to quiet land titles in California," and particularly to that portion of the section which provides that "upon the filing with the register of the United States land office of the township plat in which any such selection of unsurveyed land is located the holder of the State title shall be allowed the same time to present and prove up his purchase and claim under this act as is allowed pre-emptors under existing laws;" and also to the instructions received by this office under that act from the United States land department, a copy of which is

236 found in Zabriskie's Land Laws, at pages 603, 604, & 605, in which you were instructed as follows: "You will take care promptly to adjudicate and report all claims which may be established under this statutory provision." Now, I wish you to state whether any proof was presented to this United States land office during the time of your administration by the holders of State titles or claims under indemnity selections made from odd-numbered sections in township two south, range one east, Mount Diablo meridian, which selections purport to be noted in Tract Book No. 10 of the records of the United States land office at San Francisco.

Mr. CRANE: We object to that question on the ground that it is immaterial, irrelevant, and incompetent, first, because the law does not require such claims to be presented at the local land office; second, that the complainant has already proved, by evidence which it

has introduced in this case, that the proofs were made at the General Land Office in Washington and such proofs were found to be satisfactory there.

A. There was no testimony or any proof offered here in the local land office. The records do not show any, and my recollection is that there was none. The railroad company would have to have been summoned in had any such proof been filed.

Mr. CRANE: I object, and move to strike out that part of the answer in relation to the railroad company because it is not responsive to the question.

237 Q. 10. Was any claim or claims presented by the holders of said State titles or selections, or any proof made or tendered?

A. There was no proof made or tendered, and I do not know of any claim being presented. A claim might have been made to the register and not have come under my notice, but no proof was made or tendered.

Cross-examination of CHARLES CHAMBERLAIN:

(By Mr. CRANE:)

Q. 1. How long was Mr. Shanklin receiver before you came to the office; do you know?

A. I think he was appointed about two years before. I don't know the exact date.

Q. 2. About two years before you became receiver?

A. Yes; I think it was. It was some time in 1864. I think upon my appointment as receiver he became register.

Deposition of Duncan McNee.

Examination-in-chief of DUNCAN MCNEE on behalf of complainant:

By Mr. HARDING:

Q. 1. State your name, age, place of residence, and occupation.

A. My name is Duncan McNee; my age is thirty-eight years; I live in San Francisco, and I am engaged in dredging business and the real-estate business.

Q. 2. We- you formerly connected with the United States land office at San Francisco?

A. I was.

Q. 3. In what capacity?

A. Clerk.

Q. 4. When did you enter upon your duties in that office?

A. June 15th, 1868.

Q. 5. How long did you continue in that office?

238 A. I remained actively on duty continuously until September 1st, 1886.

Q. 6. Were you chief clerk during that time?

A. Well, I thought I was, until the present commissioner said there was no chief clerk.

Q. 7. Were you the principal clerk in the office?

A. I was for fifteen years.

Q. 8. Covering what period?

A. After 1871 or 1872; after F. A. Hyde left the office.

Q. 9. I wish you would look at Tract Book No. 11 of the records of the United States land office at San Francisco, now before you, and which embraces township three south, range three east; look at the entries under sections 17, 19, and 21, State indemnity lien selections, and state, if you know, when those entries were made in that book.

(Question objected to by respondents as immaterial and irrelevant.)

A. As I recollect, they were there in June, 1868, when I came into the office; when they were put there I cannot say.

Q. 10. You don't know when they were put there?

A. No, sir. I have had charge of the tract books ever since that time. Until I left the office, I was the only one that had charge of those tract books from the time I came into the office.

Mr. HARDING: Now, Mr. Crane, I will ask you to produce that Book One which you refer to in Respondents' "Exhibit 7 and 8."

Mr. CRANE: I have no such book in my possession; that
239 book, so far as I know, is one of the records in the United States land office at San Francisco, and is there now.

Mr. HARDING: Is this the book now before me, the book which you claim to be Book One in your "Exhibit 7 and 8?"

Mr. CRANE: The book now shown me, entitled "School Land Selections on Surveyed Land," and marked "No. 1," I believe to be the book from which "Exhibits 7" and "21" were taken.

Q. 11. Look at this book, Mr. McNee, last referred to and state in whose handwriting it is.

A. The book is entirely in the handwriting of Col. Leander Ransom, who is now dead.

Q. 12. Was he ever connected with the United States land office at San Francisco officially?

A. Never, that I ever knew or heard of.

Q. 13. Please look, under date of June 12 and 13th, 1865, in that book copied by Col. Ransom and state how many applications or indemnity school selections appear under that date in said book.

A. Forty.

Q. 14. Embracing how much land?

Mr. CRANE: I object to this testimony and move to have it stricken out on the ground that it is immaterial and irrelevant.

A. There appears to be ten thousand three hundred acres.

Q. 15. Please look at that portion of said Book 1 referring to State selections in sections 17, 19, and 21, township three south, range

three east, and look particularly at "Respondents' Exhibit 7," at the first entry thereon, and state what was the condition of the
240 basis of that selection at that time.

Mr. CRANE: (I object to the question on the ground that it is immaterial, irrelevant, and incompetent, as the record is the best evidence.)

A. The lieu or indemnity is on section 36, township 17 south, range 11 east, Mount Diablo meridian, and is public land of the United States.

Q. 16. Has that land ever been lost to the State?

(The same objection by respondents.)

A. It has not.

Q. 17. Since you have been in the United States land office at San Francisco as chief clerk during eighteen years has any proof been made or tendered by holders of the State titles in township 2 south, range 1 east, under the 3rd section of the act of July 23rd, 1866, and the instructions thereunder, dated December 13th, 1866?

Mr. CRANE: I object to that question on the ground that it is immaterial and irrelevant, and that the complainant has already shown that the proof was made at the General Land Office at Washington and was declared by the Commissioner to be sufficient.

A. No.

Q. 18. Have any of the holders of said State title, so called, presented any claims or proofs or tendered the same under said indemnity selections in said township 2 south, range 1 east, in the United States land office at San Francisco during the 18 years in which you were clerk there?

The same objection by respondents.

A. No.

241 Cross-examination of DUNCAN MCNEE:

(By Mr. CRANE:)

Q. 1. Mr. McNee, how many tract books were there in the United States land office at San Francisco at the time you went there?

A. If I am not mistaken there were twenty-eight when I came into the office. There are now thirty-three.

Q. 2. As principal clerk of that office it has been your duty generally to make the entries in these tract books, has it not?

A. Not generally, but all the time—invariably; except some entries with respect to some trifling memoranda, I have put everything on the tract books while I was there.

Q. 3. Is it not a fact that these books are books of constant reference in that office?

A. Yes, sir.

Q. 4. By the officers of the land office, as well as by people who are seeking to enter land in examining land titles?

A. Yes, sir.

Q. 5. Please state how many pages or about how many pages each of these books contain.

A. About two hundred and fifty double pages.

Q. 6. About how large are these books?

A. About 2 inches thick, eighteen inches long, and about 12 or 13 inches wide.

Q. 7. What records do these tract books contain?

A. They contain a complete record of all that has taken place in regard to the lands in the various townships embraced in these books. All filings and entries are noted there.

Q. 8. And the disposition made of the land?

242 A. Yes; and whatever has been done with the land has been noted in those books.

Q. 9. Please go on and state what in particular are entered in those books, commencing at the top of the page and going through.

A. The printed heading on each page is as follows:

1st page.

Township No. —, range No. —, district of ——.

Description of the tract.				Contents.		Rate per acre.		Purchase-money.		Name of the purchaser.
Number of section.	Section.	Township.	Range.	Acres.	100ths	Dollars.	Cents.	Dollars.	Cents.	

2d page.

Date of sale.	Number of receipt and certificate of purchase.	To whom patented.	Date of patent.	Where recorded.	
				Volume.	Page.

Q. 10. Whose duty is it to make the entries in these books?

A. Well, it is the duty of the register, by law.

Q. 11. The register and his subordinate officers?

A. Of course the register very rarely does it; he delegates it to a clerk. The tract books belong to the register's office, but the receiver has a right to go to them whenever he wants to.

Q. 12. During the time you have been clerk in said United States land office has any question ever been raised, to your knowledge, as to the correctness of the entries in the tract books in reference to township three south, range 3 east, Mount Diablo meridian?

A. Yes; it is very frequently discussed that there are State selections entered in those books where the land is unsurveyed which were entered as being filed on surveyed land.

Q. 13. I mean was there any question as to the correctness
243 of the entries themselves in that tract book.

A. What do mean by an entry?

Q. 14. Just the entry.

A. Well, I infer from that question that you mean, was simply the clerical work of taking the entry from Book 1, which has been referred to as being in Col. Ransome's handwriting. If that is what you mean I know of no mistake. The claim is transferred correctly from Book 1 of State selections to the tract book.

Q. 15. Have not these tract books been consulted and relied upon for all this time by persons making examination of lands?

A. Why, certainly. Each man drew his own conclusions from the entries. In other words, the entries are there for what they are worth. Nobody ever took the responsibility of striking them out.

Q. 16. Has not the land department acted upon them as being correct in certifying the land over to the State?

A. Well, they certified the land over. What conclusions they drew in Washington I can't say, of course.

Q. 17. In entering lands in the land office is any memorandum made upon the township plats?

A. Not of a State selection until it is listed over.

Q. 18. I asked you whether there is any memorandum made upon the township plats.

A. A State selection is not noted on the plat until listed.

Q. 19. What do you mean by plats?

A. Maps—plats. After it is listed we put a colored line around it, showing that it is listed.

244 Q. 20. The question I mean to ask you is this: When a person comes to the land office to make an entry, a pre-emption claim or homestead claim, is any mark or memorandum placed on the township plat?

A. Yes; it is. If it ain't it ought to be.

Q. 21. What mark is put upon the township plat?

A. Well, a homestead claim is marked, for instance, "A. P. 536"—that is, homestead applications or homestead entry No. 536—and when a pre-emption it is marked with a little x in red ink. The number prefixed by a- x is the official mark. For instance, x 56; that means pre-emption declaratory statement No. 56.

Q. 22. Did you know Leander Ransom in his lifetime?

A. I did. I was well acquainted with him.

Q. 23. What official position did he occupy?

A. He was the State land locating agent of San Francisco district.

Q. 24. Is he now dead or alive?

A. He is now dead.

Q. 25. How long has he been dead?

A. At least ten years.

Q. 26. How long was he, to the best of your knowledge, State locating agent?

A. I never heard when his term commenced, but his term ended in May, 1868; expired by limitation of law in May, 1868.

Q. 27. How did it happen that Mr. Ransom's books came to the United States land office?

A. The Book 1 which has been referred to is not Mr. Ransom's book.

Q. 28. What book is it?

245 A. All the explanation I can give to that is that I have always understood that when Mr. Ransom copied it from his books and gave it to the register & receiver he made a present of it to them. It was in the United States land office when I went there.

Q. 29. That is what you understood?

A. That has been the talk around the office. That book was in the United States land office in 1868, and it was in Leander Ransom's handwriting. I never heard himself say or anybody else that he was a clerk in the United States land office. That is the only explanation I can give you.

Q. 30. Then all you know about this book being a copy from Leander Ransom's books is hearsay?

A. That is all, and from the fact that the book is in his handwriting, with which I am perfectly familiar. At the same time that this Book 1 was in the United States land office I have seen Mr. Ransom's complete set of books in his office, including the book which contains the same matter as this Book 1. I have worked with him for hours and hours on State selections.

Q. 31. Is "Book 1" of "State land selections" a book of reference in the United States land office?

A. Yes; simply for convenience. I don't know of any instructions to keep the book; never heard of any. It was simply for convenience.

(By Mr. HARDING:)

Q. 32. How do you account for these entries in "Tract Book No. 11" of State indemnity selections appearing to have been made therein as early as 1863?

246 Question objected to by respondents as immaterial & irrelevant and on the ground that the witness has shown by his testimony that he knows nothing about it, and is therefore incompetent, being a matter of inference and opinion.

A. I only account for it from the fact that Col. Ransom made a literal copy of his book, whether the selections were entitled to be filed or not, and some clerk or other entered them up in the tract book just as he found them in Mr. Ransom's book. I am aware of the fact that Col. Ransom copied that Book 1 literally, and the United States land office here stuck that on the tract book for just what it was worth. If it was done under the guidance of Mr. Shanklin, as I believe from my knowledge, I know he used to take whatever was offered him and put it on the books. I can point out lots of selections that he did in that way.

(By Mr. CRANE:)

Q. 33. What do you know about those entries in the tract books of 1863 of your own knowledge and not from hearsay and inference?

A. I simply know, from examination of the dates and being familiar with the routine of the land office, that they could not have got onto the tract books properly in 1863.

(Respondents move to strike out the answer as being irresponsive to the question.)

Q. 34. Do you know anything, of your own knowledge apart from hearsay, about any of the entries made in Tract Books No. 10 and No. 11 in regard to entries that were made in 1863, 1864, or 1865?

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A. No, sir; I was not in the United States land office in 1863, 1864, or 1865.

(By Mr. HARDING:)

Q. 35. I will ask you, Mr. McNee, how these entries in red ink of indemnity school selections in Tract Book No. 10 of the records of the United States land office at San Francisco, covering sections 13, 15, 21, and 35, in township 2 south, range 1 east, got on that tract book.

(Question objected to by respondents on the ground that the witness has not been shown competent to answer it, because he was not in the United States land office at that time and does not appear to have been in that office at the time that tract book was made, and has testified already that he has no knowledge of it.)

A. I can simply answer that they have no business to be on that tract book. They got on there illegally. They have no right to be there and there is no law for them to be there.

Mr. CRANE: I move to strike out that answer as irresponsive to the question and on the ground that the witness has not been shown competent to express any opinion as to the law of the matter.

Q. 36. Do you know whether those entries were put there by anybody connected with the office or whether they were put there by some outside persons?

A. I cannot place that handwriting.

Q. 37. Was there any authority or instructions in the United States land office at that time to place those entries on that record?

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Mr. CRANE: I object to the question on the ground that it is irrelevant, immaterial, and incompetent, and also on the ground that the witness has not been shown competent to answer the question.

A. I know of no such instructions.

Q. 38. Can you give any other explanation from your long acquaintance with the routine business of the office how those entries could have been put there in that book at that early time?

Mr. CRANE: We object to the question on the ground that it is incompetent because it is calling for the conclusions of the witness, and also on the ground that it is shown that those entries were made before the witness came into the United States land office.

A. I can simply say they were put there illegally or by a misunderstanding, possibly, of the officer or clerk as to his right to put

them there, and at those dates the land was reserved to the railroad company, and it so appears by the records at that time on file in said land office. The odd-numbered sections of that township in June, 1865, were reserved to the Western Pacific Railroad Company——

Mr. CRANE: I move to strike out that answer as not responsive to the question, and, besides, it is not the best evidence.

The WITNESS (continuing): And the even-numbered sections had been raised to double price and were not subject to State
249 selection.

Mr. CRANE: We object to that on the same ground and move to strike it out on the ground that it is a volunteer statement and not the best evidence.

(By Mr. CRANE:)

Q. 39. Do you know who made those entries in the tract book in red ink to which your attention has been called?

A. No, sir; I do not.

Q. 40. All those entries were made before you had anything to do with the United States land office, were they not?

A. They purport to have been made before I had anything to do with the office. All those entries were on the tract books just the same as they are now when I became connected with the office. There are entries in that book that I put on there myself in 1870.

Deposition of John F. Swift.

Examination-in-chief of JOHN F. SWIFT on behalf of complainant:

(By Mr. HARDING:)

Q. 1. I believe you were formerly the register of this United States land office, were you not?

A. Yes, sir.

Q. —. When did you take that office and enter upon the discharge of your duties?

A. It was in the early part of 1864.

Q. 3. And continued how long?

A. Continuously until September, 1866, I think.

250 Q. 4. What was the custom of the register's office during your administration of it relative to receiving indemnity school selections on unsurveyed lands.

Mr. CRANE: We object to the question as being irrelevant, immaterial, and incompetent for the reason that the records of the United States land office are the best evidence.

A. I do not know of any answer I can make to that question. I could not swear as to any custom from memory.

Q. 5. Then I will draw your attention specifically to those entries

on Tract Book No. 11 of the records of the United States land office at San Francisco covering township 3 south, range 3 east, selections in sections 19, 17, and 21, of which "Respondents' Exhibit 8" purports to be a copy. You will observe that the entries are made in red ink. Now, state whether those entries were made at the time they purport to have been made.

Mr. CRANE: We object to the question because the witness has not shown himself competent to answer it and because he states that he was not in the United States land office at San Francisco in 1863.

A. My recollection is that there are no entries in tract books so long ago as that.

Q. 6. Were there any tract books in your office in 1864?

A. No, sir.

Q. —. When you came into the office?

A. No, sir; none had been kept up to that time.

Q. 9. When did you have tract books in the United States land office?

251 A. Well, I had been in the office certainly a year and perhaps more before the tract books were opened. There were some blank tract books in the office, but they had never been kept, and we communicated that fact to the office at Washington—that there had never been any tract books kept and that we had no means of opening & keeping them; whereupon the result of the correspondence was that the land office at Washington said they would make copies from their tract books and send us out a set, and that was done while I was in the office.

Q. 10. As a matter of fact those entries in the tract book referred to could not have been made in 1863, 1864, and 1865, could they?

A. No, sir; I think not.

Q. 11. Can you answer as to any offers of State indemnity selections on unsurveyed lands during the time you were in the office?

A. Col. Ransom, State land agent, was constantly coming to the United States land office with applications under the State acts and under various acts of that sort, but I am very sure that I never allowed such application to be made on unsurveyed land, but Col. Ransom would make them; he would come in and formally make application.

Q. 12. Did you, as register, recognize the selections on unsurveyed lands?

Quest-on objected to by respondents as irrelevant and im-
252 material and that the record is the best evidence.

A. I am very clear that I did not in any case.

Q. 13. Had you any authority or instructions for receiving any such applications?

Question objected to by respondent as leading.

A. I could not answer that question from memory. I certainly cannot recollect of them.

Cross-examination of JOHN F. SWIFT:

(By Mr. CRANE:)

Q. 1. You say that up to a certain date you had no tract books in the United States land office. What was your practice at that time in regard to receiving applications for the disposition or sale of lands, pre-emption or homestead or other modes, prior to that date?

A. Everything was done, I suppose, except the entry in the tract book.

Q. 2. I refer to how the records were kept.

A. Well, I will tell you as near as I can recollect. Take a case of pre-emption, for instance. There were a large number of claimants that would come in with declaratory statements upon unsurveyed land that would be filed and stuck away in a pigeon-hole. We did not regard them as of any effect, but when a man wanted to file such a declaratory statement it was done, and he would feel satisfied that he was doing something, and when such declaratory statements were on surveyed lands my recollection is that we would enter them in a book of declaratory statements, numbering
253 them in their consecutive order as they came in, carrying the name out and the description of the land, and taking the township plat we would mark a- x on that quarter section or whatever tract it was, and if there was more than one there might be several such x on the same tract. The x and the marks indicating the number would show what the name of the party was by turning back to a book which would have the names of the people in.

Q. 3. Did you make report of these proceedings to the General Land Office?

A. I think that went into the general monthly reports. I don't remember whether there were monthly reports or not; but there were periodical reports.

Q. 4. Of all the transactions of the office?

A. No, sir; not all the transactions. We made no report of such transactions as are not authorized by law.

Q. 5. But in regard to all proper applications for lands that were surveyed, such as you regarded proper applications under the law, did you make reports in relation to them that were forwarded to Washington?

A. Yes.

Q. 6. Those reports would contain what? Would they contain just simply the proceedings that had been done here in the United States land office?

A. Well, I can hardly undertake to say.

Q. 7. Would it be a transcript of the proceedings?

A. I suppose it would be an abstract or it would contain a substance of the business we did in our office?

Q. 8. Did I understand you to say that these tract books
254 came to the United States land office during your incumbency?

A. Yes.

Q. 9. And they were furnished you by the General Land Office, at Washington, and were written up there?

A. Up to the time of their sending them to us; they went back to the very inception of the office. We had some tract books in the office, but they were not kept, and my impression is that the office at Washington made a complete set.

Q. 10. That is, when the tract books came here from Washington they were all ready to go on with the business?

A. Yes.

(By Mr. HARDING:)

Q. 11. I want to know whether those particular entries of indemnity State lieu selections purporting to have been made in 1865 in the tract books of the United States land office June 10th or several months after the withdrawal of January 30th, 1865, for the benefit of the railroad company—were those entries in that tract book made during your administration?

(Question objected to be respondents as irrelevant and immaterial and as seeking to contradict the records of the United States land office, and is therefore incompetent.)

A. I should say, from my memory and my knowledge of the situation all together, that they could not have been made during my term of office. If they were so made they were made without my knowledge and without authority from me.

(By Mr. CRANE:)

255 Q. 12. Supposing, Mr. Swift, on June 10th, 1865, that these lands had been surveyed lands and subject to State selection and other locations, what would your answer be then, upon your recollection, as to whether they were entered upon the books as they appear to have been?

A. I do not believe that those entries were made at the time they purport to have been made.

(By agreement of counsel for the respective parties herein the time within which testimony may be taken herein is extended to and including Wednesday, March 30th, 1887.)

(Examination continued to Wednesday, the 30th inst., at 10.30 a. m., at the office of the examiner.)

WEDNESDAY, *March 30th*, 1887.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane, Mr. Mullany, and Mr. Martin, of counsel for respondents.

Deposition of J. West Martin.

Examination-in-chief of J. WEST MARTIN on behalf of respondents.

(By Mr. CRANE:)

Q. 1. State your name, age, place of residence, and occupation.

A. My name is J. West Martin; my age, sixty-five years. I live in Oakland, and am by occupation a banker.

Q. 2. You are one of the respondents in this suit?

A. Yes, sir.

256 Q. 3. And the claimant of certain lands involved in this suit?

Mr. CRANE: I suppose it will be admitted that Mr. Martin is charged with claiming section 13.

Mr. HARDING: I think the pleadings sufficiently show that.

Q. 4. And you claim certain of the lands in controversy in this suit?

A. I do.

Q. 5. What are those lands? Where are they?

A. They are section 13, township 2 south, range one east, I believe.

Q. 6. How long have you been interested in those lands?

A. Since March, 1882.

Q. 7. From whom did you purchase them?

A. From my brother, Samuel B. Martin.

Q. 8. Did you before you made this purchase have an abstract made of the titles to the lands?

A. Yes; I did.

Q. 9. Have you that abstract with you?

A. No, sir; I did not bring it, but I think I have it.

Q. 10. At the time you made that purchase in 1882, had you any notice or knowledge or any kind of information in regard to the claims that have since been set up in this suit?

(Question objected to by complainant as incompetent.)

A. I had neither notice nor knowledge nor information of any other claim or title than that which I bought.

Q. 11. Did you upon the purchase of these lands enter into possession of them? State what you did in reference to the

257 taking possession, if anything, of this land immediately after your purchase or at any time.

A. Yes; I became the owner of them and took possession and jurisdiction of them and have had it ever since, except some squatters took violent possession of the lands.

Q. 12. Did you pay a consideration for these lands?

A. Yes, sir.

Q. 13. State what it was.

(Question objected to by complainant as incompetent, irrelevant, and immaterial.)

A. I bought this particular piece of land with other lands that were named in the deed. The deed recites a consideration of twenty thousand dollars. The actual consideration which I paid was about thirty-two thousand five hundred dollars for the lands embraced in the deed.

Q. 14. Have you that deed?

A. Yes; I have that deed and now produce it.

Q. 15. You refer-ed to the deed of January 14th, 1882, which you now produce?

A. Yes.

Q. —. Was the consideration mentioned in that deed paid in money?

A. Yes.

Mr. HARDING: All this testimony is objected to as being incompetent, immaterial, and irrelevant, and not in response to anything brought out by complainant.

Mr. CRANE: I will now introduce in evidence the deed produced by the witness and above referred to, being deed of Samuel
258 B. Martin to J. West Martin, dated January 14, 1882, duly acknowledged and recorded August 22d, 1882, volume 42 of Deeds, Records of Contra Costa county, page 205.

Marked "Respondents' Exhibit 53."

(It is agreed that the said original deed, "Exhibit 53," may be withdrawn upon the substitution in place thereof of an approved copy.)

Mr. HARDING: We object to the introduction of this deed as incompetent, irrelevant, and immaterial.

Q. 17. Mr. Martin, at how early a date were you acquainted with those lands—with those lands in controversy—say, section 13 of the lands in controversy?

A. I became acquainted with those lands about 1853 or 1854; that is about the earliest period.

Q. 18. And to what other period have you been familiar with them down to the present time?

A. Well, pretty generally, but they were under my eye until up to 1865.

Q. 19. Do you know what the market value of those lands was in 1862, 1863, and 1864?

(Question objected to by complainant as irrelevant, incompetent, and immaterial.)

A. They had a value of a dollar and a half or a dollar and a quarter an acre. I don't think there was any great demand for them at that time.

Q. 20. State, if you know, what the market value of those lands was in 1870 and 1871—about that time.

The same objection by complainant.

A. I should think they were worth about ten dollars an acre.

259 Q. 21. State what they were worth in 1883.

(Question objected to by complainant on the same grounds as to the last question.)

A. About twenty-five dollars.

Q. 22. Since 1862 up to the present time have there been any improvements made or placed upon those lands—on section 13?

The same objection by complainant.

A. Yes, sir; they have been improved with an ordinary farm-house and barn and some fencing, I believe; I don't know how much.

Q. 23. Have those lands been used or cultivated? And, if so, state at any time between 1862 and 1863, a period of twenty-one years. State what use those lands have been put to, if any?

(The same objection by complainant.)

A. I didn't know much about the cultivation of them until I became owner of them. I believe they had been cultivated before, but not to my knowledge.

Q. 24. Had those lands been put to any other use, so far as you know, between 1865 & 1883?

A. No, sir; I was not on the ground during that time.

Q. 25. Have you put them to any use since you bought them? And so state.

The same objection by complainant.

A. Yes; they have been constantly farmed ever since I have owned them.

Q. 26. I will ask you, Mr. Martin, whether in the purchase of these lands described in this deed, "Exhibit 53," section 13 and other lands, whether any discrimination was made in regard

260 to the price per acre for any particular tract or tracts of land therein described?

A. No, sir; they were bought as a whole at a uniform price per acre.

Q. 27. Were the lands described in this deed, "Exhibit 53," generally of a uniform value at the time of the purchase?

(The same objection by complainant.)

A. I think they were.

Mr. HARDING: Complainant moves to strike out all the testimony of this witness on the ground that it is incompetent, immaterial, and irrelevant to any issue in this suit, and we waive cross-examination.

Mr. CRANE: I now introduce in evidence a document which has been agreed to be a true and correct copy of the original document

on file in the Land Department at Washington, dated at San Francisco, May 25th, 1878, and purporting to be a communication by William D. English to the Hon. J. A. Williamson, Commissioner of the General Land Office, with the endorsements showing that it was filed in the local land office on the 25th day of May, 1878, to which is attached an affidavit of John La Crose, since deceased, which is dated May 24th, 1878.

Marked "Respondents' Exhibit 54."

I desire to state that I offer this document for the purpose of showing the connection between what the complainant in this suit has designated "an appeal by Mr. English," and for the purpose of showing that upon the same date and as a part of the same transaction the document now introduced in evidence was sent to
261 the same place, and that it shows that it was not an appeal, but an application for a hearing upon the matter in question before the Land Department.

Mr. HARDING: Complainant objects to the introduction of this document as being incompetent, immaterial, and irrelevant, and also objects to counsel's construction of the document.

Mr. CRANE: I have in my hand copies, duly certified by the Commissioner of the General Land Office at Washington, of three communications, only one of which I wish to introduce in evidence. As those documents cannot be detached without mutilating the documents I will read the one which I propose to introduce in evidence, which is as follows:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., *Feb'y 1st*, '70.

"SIR: I transmit herewith a map of the location of the Western Pacific Railroad of California between San José and the point of junction with the Central Pacific Railroad near Sacramento.

"This map is accepted and will become the basis for the adjustment of the land grant.

"The order of the 22nd of March last directing the issuance of patents to the company to be suspended is hereby revoked.

"Very respectfully y'r ob't servant,

"J. D. COX, *Secretary.*

"Hon. Jos. S. Wilson, Commissioner of the General Land Office."

I introduce this letter in connection with the railroad map filed in the office of the Secretary of the Interior in 1870.

Mr. HARDING: We object, on the ground that it is irrelevant
262 and immaterial under the pleadings in this suit, in this: that there is no issue on the question to which the document relates.

Mr. CRANE: I now introduce in evidence a communication, dated at Washington, May 6th, 1870, from Joseph S. Wilson, Commissioner of the General Land Office, to the register and receiver of the San Francisco land office, being a copy certified by Mr. Leigh, receiver of the United States land office at San Francisco.

Marked Respondents' Exhibit 55.

I introduce these two documents in connection with the map of 1870 for the purpose of showing that the map was intended as the basis of the selection of lands to which the railroad company were entitled under their grant, and they, having delineated the Rancho Las Pocitas upon that map in accordance with the Dyer survey, are precluded from claiming any lands within that survey.

Mr. HARDING: We make the same objections to the introduction of this document as were made to the last.

Deposition of S. G. Hilborn.

Examination-in-chief of S. G. HILBORN on behalf of respondents:

Q. 1. State your name, age, place of residence, and occupation.

A. My name is S. G. Hilborn, I live in San Francisco, and I am by occupation an attorney-at-law.

Q. 2. State whether or not you were the late United States district attorney for California; and, if you were, for what period did you hold that office?

263 A. I was, and I held that office for about four years preceding the first of January, 1887.

Q. 3. Do you remember, while you were United States district attorney and some time in the year 1883, of certain documents being forwarded to your office in reference to the commencement of a suit in the name of the United States against certain claimants of State titles, and which suit was afterwards commenced, entitled "The United States *vs.* Henry Cartner *et al.*," being the present suit?

A. I have a recollection of such documents.

Q. 4. What, if anything, did you do with those documents?

A. Suit was commenced in the name of the United States, the active work being done by Messrs. Parker & Waterman. Mr. Parker & Mr. Waterman were the gentlemen I did business with.

Q. 5. What did you do with these papers and documents that came to you?

A. I think all the papers were turned over to them, excepting the letter or communication—I mean the instructions, and so forth. They drew the bill and have done all the work in the case.

Q. 6. They have conducted the case?

A. They have conducted the case. I have signed the papers in my own name and that of the United States Attorney General.

Q. 7. I will ask you whether upon the receipt of those papers you made any examination to ascertain whether the United States had any cause of action in this suit or not.

264 A. I do not think I did, because the instructions were absolute, from the Attorney General, to commence suit.

Q. 8. Who commenced the suit—who drew the complaint?

A. I think I stated before that Messrs. Parker & Waterman have done all the work in the case. They prepared the bill.

Q. 9. Did you ever read the complaint?

Mr. HARDING: We object to that as entirely improper.

A. I think I did. I always did read those complaints, whether they were prepared in the office or outside of the office, to see that there was nothing scandalous in the bills.

Q. 10. State whether or not, after the commencement of this suit, you at any time took any part in the conduct of this suit in court.

A. I do not think I ever appeared in court in relation to the matter.

Q. 11. You never appeared in court in the case?

A. No, sir.

Q. 12. State whether or not you have at any time considered yourself in any way responsible, as United States district attorney, for the conduct and prosecution of this suit.

A. Yes. While I was district attorney I was responsible for all suits brought in the name of the United States, unless there were special counsel appointed to manage that particular case. I am not certain whether Messrs. Parker & Waterman were specially appointed in this suit or not.

Q. 13. You never took any charge of the case, you say?

265 A. No, sir; no more than what I have stated. I have signed all papers that it was necessary for me to sign as the United States district attorney.

(By Mr. HARDING:)

Q. 14. After examination?

A. After explanation or examination.

Q. 15. State whether or not you ever employed Messrs. Shafter, Parker & Waterman, or any of them, to conduct this case.

A. I never did; no, sir. If you mean by employment that I solicited them to take it and promised them any reward, I did not. That I authorized them to do it, is true.

Q. 16. You authorized them to commence this suit?

A. I authorized them to do what they have done, and conduct the litigation.

Q. 17. Is that authority in writing?

A. No, sir.

Q. 18. Why did you authorize them?

A. My recollection is not very distinct, but I presume that Mr. Waterman & Mr. Parker, or both of them, came to me and offered to do the work in that case, probably stating that they represented some of the parties who were interested in the result, and so forth. My recollection is not very distinct as to that matter.

Q. 19. They represented to you that certain private parties were interested in the result?

A. I say, probably that was so. I don't remember; but they must have come and volunteered to do this work. I certainly could not have gone to them, and being a respectable firm of lawyers and having come and offered to do this, there certainly could be no objection that I could see.

266 Q. 20. Now, Mr. Hilborn, don't you consider this a case in which the Attorney General of the United States has loaned

the name of the United States to private parties in which to prosecute their own private case?

(Question objected to by complainant as improper & incompetent.)

A. Well, I would not want to express any opinion as to the action of the Attorney General or criticise his actions or construe his motives.

Q. 21. Did you know that a bond was filed in this case for the purpose of indemnifying the United States against costs?

A. Yes, sir.

Q. 22. Now, then, if the United States had any interest in this case why was such a bond filed?

A. At this late day so long a time has elapsed that I cannot now explain why the bond was exacted. I have read over the original letter from the Attorney General and no mention is made there of a bond for costs. I have just read that letter over this morning. Why a bond was required I cannot now state, unless there was some other letter, which I have been unable to find, which would explain the matter.

Q. 23. Now, then, I will read a portion of the condition of this bond:

"The condition for this application is that whereas the Attorney General of the United States of America is about to file in the United States circuit court of the ninth circuit of the United States of America for the district of California, at the request of the above-named William B. Carr, a bill in equity."

What does that mean, by stating that the Attorney General
267 is about to file a bill in equity at the request of William B. Carr, if you know?

A. I don't know anything about it.

Cross-examination of S. G. HILBORN:

(By Mr. HARDING):

Q. 1. Did you ever receive any instructions from the Attorney General of the United States to require a bond in this suit?

A. I am not certain. It seems strange that I should have required a bond without instruction, but I am unable to find the letter in which I am requested to get this bond. I will state this, that it very often occurs that the Attorney General, at the same time he directs a suit to be commenced in the name of the United States, often requires a bond to be given to save the United States harmless. There are several cases in which I know these bonds to have been given, and it may be that I deemed that was implied in this case—that they should give a bond—and that I required them to give a bond. It may be that I did that.

Q. 2. I wish you would look at "Respondents' Exhibit 51," which purports to be a copy of a letter of the Attorney General, to which you have referred for the purpose of refreshing your memory, and state what your recollection is about that matter.

A. I say that this letter of February 21st, 1883, which is the only letter which I can now find in the office relating to this case, does not require a bond, and why I did require a bond the motives and reasons for doing so I am not now clear upon.

268 *Deposition of F. H. Waterman.*

Examination-in-chief of F. H. WATERMAN on behalf of respondents:

(By Mr. CRANE:)

Q. 1. State your name, age, residence, and occupation.

A. My name is F. H. Waterman; my age is fifty-six years; I live in San Francisco, and am by profession an attorney-at-law and one of the attorneys for the complainant in this suit.

Q. 2. Do you belong to the firm of Shafter, Parker & Waterman?

A. I do.

Q. 3. The persons spoken of as having commenced this suit?

A. Yes, sir.

Q. 4. Is the firm of Shafter, Parker & Waterman in the service of the United States, and were they at the commencement of this suit, and have they been in the prosecution of this suit?

A. I so consider it; yes, sir.

Q. 5. Have you any arrangement with any officer of the United States by which you are to receive any compensation for these services?

A. No, sir; no compensation from the United States.

Q. 6. Is it not a fact, Mr. Waterman, that you procured the Attorney General to lend the name of the United States in which to have this suit brought in the interest of private parties?

A. As attorneys for parties in interest, we represented the propriety of bringing this suit to the authorities in Washington, and as the result of which this suit was ordered. We drew the bill and have become the efficient workers in the suit on behalf of the
269 United States. There is no doubt about that, and I don't see why the matter should be brought up here. I will say that, in connection with Mr. Hilborn, we consulted and counselled with him a good deal in the matter and have kept him informed. I have been the means of communication between my firm and Mr. Hilborn and have kept him informed.

Q. 7. I didn't ask you about that. Who are the real parties in interest in this suit?

A. I don't know as I am able to tell all of them.

Mr. HARDING: We object to this testimony as incompetent; that the pleadings in this suit show who the real parties in interest are.

Q. 8. Do you know any of them?

A. I think I do.

Q. 9. State who they are.

Mr. HARDING: We object on the ground that it is incompetent; the pleadings show who the parties in interest are.

A. The first that occurs to me are the heirs—the wife and children of E. Dyer and the surviving brother, E. H. Dyer.

Q. 10. Is the man E. H. Dyer, to whom you refer, the Dyer that made the Dyer survey of 1865, which has been referred to in this suit?

A. Yes, sir.

Q. 11. Do you know any others that are interested?

A. Yes; I think I do, but I am not certain.

Q. 12. Well, state.

A. Well, I think D. O. Mills is interested.

Q. 13. Well, who else?

A. I think Leland Stanford is interested; I think J. B. Hagin is interested in it, and that is all I know.

270 Q. 14. Are you interested?

—. No, sir.

Q. 15. Were you interested when this suit was commenced?

A. No, sir.

Q. 16. Have you stated all that you know of that are interested in this suit on the part of the complainant?

A. Yes; I have.

Q. 17. Who employs the attorneys who have been employed in this suit to prosecute it?

(Question objected to by complainant as irrelevant, incompetent, and immaterial.)

A. The parties in interest that I have mentioned, so far as I know.

Q. 18. At the commencement of this suit was William B. Carr interested in the suit?

A. I think he was.

Q. —. The principal in this bond?

A. I think he was. That is the only way I can explain the recital in that bond, "Exhibit 52." I think he had not at that time parted with his interest in that land.

(Mr. HARDING: Complainant objects to and moves to strike out the testimony of the last witness as incompetent, irrelevant, and immaterial to any issue in this suit.)

Examination continued in conformity with agreement of counsel until 2 o'clock this afternoon.

WEDNESDAY, *March 30th*, 1887—afternoon.

Present: Mr. Harding and Mr. Waterman, of counsel for complainant; Mr. Crane and Mr. Mullany, of counsel for respondents.

271 (By Mr. CRANE:)

Q. 1. Will you please look upon the map marked "Exhibit Hopkins" and state whether you have delineated thereon since that map was first exhibited in evidence the surveyed lines of the Lewis survey of the Las Pocitas rancho?

A. I have delineated the Lewis survey upon the original map, "Exhibit Hopkins," but it is not upon the tracing of that map in evidence.

Q. 2. Could you place that upon the tracing?

A. Yes, sir.

Q. 3. I wish you would do so.

A. It is indicated upon the original map by the figure drawn in black lines and shaded green, and on the tracing by the figure drawn in black lines and shaded. When I drew the lines of the Lewis survey on "Exhibit Hopkins" with the instruments that I had and the light that I had the lines may not be exactly correct, but they are substantially correct. In fact, the same may apply to the whole exhibit.

Q. 4. Since the time that you were in charge of the archives of the Mexican Government in the surveyor general's office, has your attention ever been called to what is called the Lewis survey of the Las Pocitas rancho?

A. I have seen the Lewis survey of the Las Pocitas rancho; yes, sir.

Q. 5. Look upon Complainant's "Exhibit D D," and say whether that is a delineation of the line of that survey.

A. This is a correct tracing, I think, of the Lewis survey.

Q. 6. Do you know anything about the history of that survey, as to when it was made and under what circumstances?

272 (Mr. HARDING: We object to the question on the ground that it is too general.)

A. Yes; I do know.

Q. 7. What is the nature and character of the survey?

Mr. HARDING: We object to the question as incompetent; that the survey shows for itself what its nature & character is.

A. This survey, as shown by the records of the surveyor general's office, was made in 1854, at the request, as I recollect, of the owner or claimant of the rancho.

Mr. HARDING: We object to the witness testifying as to what the records of the surveyor general's office show, as the records themselves are the best evidence.

Q. 8. Have you made an examination of the topography of the Livermore Valley and surroundings on the ground?

A. I was first in the Livermore Valley in 1854, and again perhaps some six months since, more or less; and upon the last occasion I made some general examination of the topography of the valley.

Q. 9. I wish you would now look upon "Exhibit Hopkins" and state if any one of the lines of the Lewis survey mark any of the exterior boundaries of the grant Las Pocitas, as described in the final decree of confirmation.

(Question objected to by complainant as incompetent, and withdrawn.)

Q. 10. Do you know the location on the ground of the "Lomas de las Cuevas?"

A. I know the locality, more or less.

Q. 11. What is the meaning of the term "lomas de las cuevas?"

A. It means "the hills of the caves."

Q. 12. Are those hills correctly delineated on Exhibit Hop-
273 kins?

A. Approximately they are.

Q. 13. How near is the north line of the Lewis survey, according to "Exhibit Hopkins," in the nearest place from the "Lomas de las Cuevas" or northerly boundary of the Las Pocitas rancho as called for in the decree of confirmation?

Mr. HARDING: We object to the question on the ground that it is incompetent, as Mr. Hopkins never has made any survey and does not profess to be a surveyor, and it does not appear that he has ever examined the ground with a view to locating that line; and, furthermore, that the location of that line has been fixed and determined by authority of the Government of the United States many years since, and the question of its location is not now an open one.

A. The nearest point on the north in this exhibit will appear to be some few miles to the summit of the Lomas de las Cuevas.

Q. 14. What is the nearest point from the western line of the Lewis survey to the Tasajara creek—the place designated as the western boundary of the Las Pocitas grant as fixed by the final decree of confirmation?

(The same objections as to the last question.)

A. Nearly five miles.

Q. 15. What is the nearest point of the easterly line of the Lewis survey to the Sierra de Buenos Ayres?

(The same objections by complainant.)

A. Some two miles to the summit of the Sierra de Buenos Ayres.

274 Q. 16. What is the character of the Sierra de Buen-s Ayres in regard to whether they are bold hills or whether they slope gradually?

A. They are rather rugged and bold, as the name sierra would indicate.

Q. 17. Mr. Hopkins, you will now please look at Exhibit F F, being the compiled map introduced by complainant, and state from your knowledge of the topography of that country whether the topography in connection with what purports to be the lines of the Lewis survey on that map are correctly given.

A. I do not remember of any hills on the western boundary. There is a range of hills in that direction, looking to the west, but my recollection is that there was a plain there, westerly. The topography of this map would indicate that the lines of the Lewis survey run up to the foot of the Sierra de Buenos Ayres on the east.

Q. 18. And what is the fact?

A. I do not think they do. My recollection is that they do not upon the ground—from my recollection of the topography of the ground. Hence it would seem to me that the topography upon this Exhibit F F is not correctly shown as regards the Lewis survey on the western side as shown upon the map. I do not remember any hills in that direction; it is a plain.

Deposition of Rufus C. Hopkins.

Cross-examination of RUFUS C. HOPKINS.

(By Mr. HARDING):

Q. 1. Mr. Hopkins, you do not claim to have ever traced on the ground any of the lines run there by Lewis in making this survey of 1854, do you?

A. No, sir.

Q. 2. You don't know how those lines are marked on the
275 ground?

A. I do not; no, sir. I have had them pointed out to me, the place where they ran, but of course there are no landmarks to show.

Q. 3. Did you know William J. Lewis?

A. I knew him personally and well.

Q. 4. For how many years?

A. Since 1850 up to the time of his death, some six or eight years ago.

Q. 5. What was his business?

A. He was a surveyor and civil engineer and a very accomplished mathematician and was a graduate of Yale College.

Mr. CRANE: We move to strike out all the testimony of this witness in regard to William J. Lewis as not being cross-examination.

Q. 6. If William J. Lewis made an official survey under instructions issued to him by the United States surveyor general for California and under the obligation of his oath as a United States deputy surveyor, and returned it and platted it, and that survey was approved, would or would not such survey, if it differed from your testimony just given in relation to the boundaries of the Las Pocitas rancho, have very great weight with you and serve to largely qualify your opinion?

(Question objected to by respondents as immaterial, irrelevant, and incompetent, and as hypothetical.)

A. I think that any professional work executed by William J. Lewis would be correctly executed, and I would have every
276 confidence in his execution so far as the work had been performed; but as to his judgment in matters outside of the mere matter of the execution of the work, why that's another thing. As to his judgment as to whether this was a hill or that a mountain, I would not attempt to give an opinion. William J. Lewis was a very accomplished engineer and surveyor, and his work, as far as

work was concerned, was correct, but the data upon which that work was based would involve questions of judgment outside of his work, and as to that I could give no opinion.

Q. 7. Do you know who first established on the ground the dividing line of the establishment of San José, the southern boundary called for in the grant of the Las Pocitas rancho?

A. I do not; no, sir.

Q. 8. Do you know when it was first established?

A. No, sir; I do not.

Q. 9. Do you know where it was established to be?

A. I do not. I have had the boundary shown to me on the ground, but I could not locate it on the map. Some landmarks have been pointed out to me on the ground as indicating this line, but I could not point it out on the map.

Q. 10. You would not claim that the southern boundary of the Las Pocitas rancho, as called for in the decree of confirmation, should go further south than the one established by Lewis, would you, taking into consideration the Arroyo Mocho creek, a stream lying on the outside of the exterior boundaries of the diseño of the Las Pocitas rancho?

Mr. MULLANY: We object to the question on the ground that it is incompetent, irrelevant, and immaterial, and that there is
277 no controversy as to lands located on the southerly side of the Rancho Las Pocitas, and only upon the west and east sides, and that the Arroyo Mocho, so called in the question, is unknown in the description of the boundaries of the Rancho Las Pocitas.

A. Well, as I testified in my former examination, the only way by which I could fix the southern boundary of the Las Pocitas rancho would be by drawing a direct line between the termini of the eastern & western boundaries, since the establishment of San José never had any fixed boundaries that I know of.

In early times the Mission of San José claimed all the territory, including the Livermore Valley, and as ranchos were from time to time granted out of that mission the boundaries became limited, so that, the calls of the Pocitas grant being on the west by the Tasajara creek, practically, and on the east by the Sierra de Buenos Ayres, the southern boundary could only be made by drawing a line from the southern terminus of the eastern to the western boundary of the Las Pocitas grant, and that would fix or make the southern line. The Lewis survey would not extend as far south as such a line.

Q. 11. I will repeat the question, and you can answer it categorically: You would not claim that the southern boundary of the Las Pocitas rancho as called for in the decree of confirmation should go further south than the one established by Lewis, would you, taking into consideration the Arroyo Mocho creek, a stream lying on the outside of the exterior boundaries of the diseño of the Las
278 Pocitas rancho.

A. As explained in my former examination, the southern

line of the grant would go further south; the southern line of the Lewis survey would not reach as far south.

Q. 12. Were you aware that the Arroyo Mocho creek was the recognized boundary between the San José rancho and the Las Pocitas rancho?

A. No, sir; I was not.

Q. 13. Look on Complainant's "Exhibit K K," being a traced copy of the original diseño of the grant Las Pocitas, and I will draw your attention to the position of the Arroyo Mocho there delineated, and that the southeast corner of the grant seems to corner on that creek, and then I will repeat my question and ask you to state whether or not the south line of the Las Pocitas rancho, as indicated on that diseño, could go further south than the Arroyo Mocho creek.

A. As shown by the diseño it could not, if the diseño is the controlling guide.

Q. 14. Look on this traced copy of the original diseño, Exhibit K K, and state what this delineation represents immediately under the words "Linderos de Dolores Pacheco."

A. It appears to represent hills.

Q. 15. Now, I will ask you to look at "Complainant's Exhibit C C," being the Lewis survey and the field-notes thereof, at page 4, commencing, "Boundary adjoining rancho of Don José Dolores Pacheco. Monday, May, 1854, Augustine Alviso, the present owner of the rancho granted José Dolories Pacheco, having been previously notified by me in writing, appeared and pointed out a line
279 running from the oak marked R. L. 1 towards a chimozal on the Golgonez range in a course N. 2° 50′ W. as the boundary between his land and that of Robert Livermore, in which the latter concurred. Began at oak R. L. 1 to run this line: N. 2° 50′ W. 24 chains 30 links, Arroyo de las Pocitas; 32 chains, N. side valley, at base of ascent, course along base of hill S. 68° E.; 54 chains, top of spur; * * * 60 chains, top of spur; * * * 20 chains, summit of ridge, probably 500 feet above general level of Livermore's Valley; * * * 253.50 chains, summit of high ridge, highest point of ridge; 10 chs., left; 278 chains, base of ridge in valley, nearly level with the general plain, course of base of ridge S. 55° E.; 283.50 chains, accross small creek; 286.25, cross again same at base of ridge; 303 chains, summit of knoll; eastern foot of ridge last passed bears S. 34° E.; summit Cuevas knob N. 77¼ E.; 326.50 chains, summit of spur knoll, S. 63½° E." Now, in looking over those notes, as you have done with me, say whether or not that does not qualify your opinion with regard to there being a range of hills on the west, as located by Lewis.

A. These field-notes purport to be a record of the line as run. They indicate and show that he ran over hills, of course. I could not pretend from memory to say they were not there against this record, especially when that could be so easily ascertained by running the line on the ground. Those field-notes are very vague. There is one hill represented there as being five hundred

280 feet above the level of the plain, and the call of the spur of a hill is too vague to form any opinion upon as to the country.

Q. 16. One hill of this range is given in the field-notes as being at an elevation of five hundred feet above the level of the valley. You would not undertake to say that no such hill was there, would you?

A. Of course I could not pretend to say that against the record when it could be so easily ascertained. Of course the testimony I give is from memory.

Q. 17. I will read further: "The line continuing at 350 chains, foot of Cuevas hill, at northwest corner of rancho." You don't undertake to dispute that call any say that it is incorrect, do you?

A. The question might arise as to where the hills commense. That would be a matter of judgment. I would not undertake to say that Lewis did not suppose that was the foot of the hills, but that is a matter to be determined by measurement and not by judgment. The foot of the hill where it rises from the plain is uncertain; it is not a point. It is like the word "falda" of a hill, meaning the "skirt" of a hill, which is not definite.

Q. 18. I will continue reading from the field-notes, from page 7: "From R. L. 2 the northern boundary of the rancho was run on a course S. 76° E., following as near as practicable the base of the Cuevas hill, but in consequence of the projecting of the spurs and the indentations of the valley the line sometimes passed over
281 the points of the spurs and sometimes crossed narrow valleys connected with general plain." You do not claim that that call is incorrect, do you, Mr. Hopkins?

A. I would not claim that Lewis, the surveyor, intended to run the line incorrectly, but I will make the same answer as before—that the base of a hill is a matter of judgment. He might put it at one place and another man might put it at another place.

Q. 19. Please look at pages 7, 8, and 9, 10 and 11, embracing the northern and southeastern boundaries of the Las Pocitas rancho as surveyed by Mr. Lewis in 1854, and state whether or not the continuous calls for spurs, hills, gulches, and ridges at very few chains do not change or modify your opinion as to the location of that boundary.

A. No, sir; it does not. I will say that where a lomania or range of hills is called for as a boundary of a rancho my experience is that in all Spanish countries the summit of these ranges of hills was taken as the boundary, and not the foot.

Q. 20. Then you base your opinion as to the proper location of the boundaries of this Las Pocitas grant on the proposition or on the theory that they should have gone to the summit of the ranges of hills instead of to the foot?

A. No, sir; I do not. I simply base it upon the call of the grant. I mentioned this matter incidentally, however, and probably improperly.

282 Q. 21. Do not the petition and other title papers in the case of the Las Pocitas call for the borders of the hills instead of the summits?

(Question objected to by respondents on the ground that the title papers themselves are the best evidence.)

A. I do not remember, exactly, the calls; my recollection is that it calls for the Lomas de las Cuevas.

Q. 22. Does not the language of the first portion of the description of the original petition for the grant Las Pocitas, of which Respondents' "Exhibit 23" is a copy, call for "El parage conocido con el nombre de las Pocitas, calindante con las orillas de las lomitas de las Pocitas;" and, if so, how do you translate that language?

A. Yes; that would be for the skirts of the hills of the Las Pocitas.

Q. 23. Then the papers do not call for the summit, do they? Is there any call in any of the title papers for the summits of the Cuevas hills or the Buenos Ayres hills?

A. No, sir; not that I remember of. My recollection is that the title papers call for the Lomas de las Cuevas and the Sierra de Buenos Ayres.

(By Mr. MULLANY:)

Q. 24. That is, on the north and east?

A. Yes, sir.

(By Mr. HARDING:)

Q. 25. In your view in fixing or locating the boundaries named in the decree of confirmation, do you take into consideration at all the question of quantity, two leagues?

A. Not with relation to the exterior boundaries; no, sir.

Q. 26. Do you take into consideration at all the question
283 as to what land was known at the time of the making of the grant as Las Pocitas?

A. I take alone the calls of the original title papers and in the decree of confirmation, without regard to any quantity or any place mentioned.

Q. 27. I will ask you this question: Is there not a call in the original title papers for the Las Pocitas rancho to this effect, that the land petitioned for is about two leagues northwest and southeast along the valley and about two leagues across the valley.

(Question objected to by respondents as incompetent, not being the best evidence.)

A. I cannot remember.

Q. 28. What is the general course of the Livermore Valley?

Mr. MULLANY: We object to the question unless it is first shown that the Livermore Valley has a general course; it is assuming a fact not shown in evidence.

A. I cannot tell.

Q. 29. Do you mean to say that you don't know what the general course of the Livermore Valley is?

A. I cannot tell without examining some map; I cannot tell from memory.

Q. 30. Have you ever made a survey in the Livermore Valley?

A. No, sir; I have not.

Q. 31. You do not claim to be a surveyor at all, do you?

A. I am theoretically a surveyor and have made surveys thirty years ago.

Q. 32. But not in Livermore Valley, have you?

A. No, sir; not in Livermore Valley.

(By Mr. CRANE:)

284 Q. 33. In defining the exterior boundaries of a rancho where natural objects are given in the decree of confirmation on all the sides north, east, south, & west, would the diseño be of very much use in locating those boundaries generally?

A. It would not be reliable. It would be of course used as explanatory and might be more or less correct.

Q. 34. But as a general rule those diseños are not very correct, are they, in regard to the—what do you say in regard to those diseños? Does this diseño marked Exhibit K K give anything like an accurate idea of the shape of that grant in accordance with the natural objects called for in the decree of confirmation?

(Question objected to by complainant as incompetent.)

A. I do not think it does.

(By Mr. HARDING:)

Q. 35. Is not that diseño specially called for in the decree of confirmation and reference made to it in the calls of the decree?

A. I think it is.

Q. 36. In your location of the boundaries of the Las Pocitas rancho I understand you to attach little or no importance to this diseño; is that so?

A. Not of so much importance as to the calls of the grant; not so much as to the natural landmarks called for by the grant and decree both. The decree of confirmation follows the grant, I believe.

Q. 37. In locating the Lewis survey upon the Hopkins diagram did you do that work from the official field-notes or a copy of them in the surveyor general's office?

A. No, sir.

Q. 38. Did you consult them at all?

A. No, sir.

285 Q. 39. Did you consult the field-notes of any of the surveys in the surveyor general's office in putting that Lewis survey upon the "Exhibit Hopkins"?

A. No, sir.

Q. 40. Did you lay down the lines with a scale & dividers?

A. I did not use a scale and dividers. It was not necessary. I did it with a rule.

Q. 41. I see in this diagram, "Exhibit Hopkins," that you have omitted all the topography of the Lewis survey, such as the "Arroyo Mocho creek," the "Las Pocitas springs," the "Arroyo Seco," the "Casa," the "Posita," the arrow indicating the points of the com-

pass and all the other common features given on the diseño. Why did you do that?

A. Those things were not shown on the diagram from which I made this location of the Lewis survey on the map, "Exhibit Hopkins."

Q. 42. Will you undertake to locate this diseño on "Exhibit Hopkins"? And, if you can do so, do so now.

A. No, sir; I will not undertake it. With sufficient time, I might possibly make an approximate location, but it would take some time.

Q. 43. Do you mean that you are unable to locate it on your diagram?

A. I cannot do it without taking considerable time and labor, and then with, perhaps, nothing more than an approximate correctness.

Q. 44. Where would you locate the western boundary of the diseño on "Exhibit Hopkins"?

(Mr. CRANE:) We object to that question, as the witness has stated that he could not at the present time make such location
286 or designation.

A. I could not locate the western boundary on the diagram, as there are no hills shown on this "Exhibit Hopkins" on the west of the Las Pocitas grant.

Q. 45. In placing the Lewis survey on your diagram, "Exhibit Hopkins," you have so located the northeastern line as to cut off a very small fraction of the patented grant, probably an acre. Can you testify specifically and accurately as to whether that cuts into the patented grant or not?

A. I cannot.

Q. 46. Do you know whether or not it was the intention in officially locating the grant for patent to keep within the exterior boundaries as established by the Lewis survey?

Mr. CRANE: We object to that question as being immaterial and irrelevant; and, further, that the surveyor was instructed by the surveyor general, by an express order, to make the survey of the amount of lands which was patented within the exterior boundaries of the Las Pocitas grant, which boundaries were embraced within the order.

A. I know nothing about it except from inference.

Q. 47. Go on and state.

Mr. MULLANY: We object to his inference.

A. The location of the two leagues as patented seems to indicate, as it was indicated by the surveyor, to be located within the exterior lines of the Lewis survey. That is all I can say about it.

(By Mr. MULLANY:)

Q. 48. Have you any other source or ground from which to
287 draw an inference except from what appears from the diagram or map before you, on its face?

A. None whatever.

Deposition of H. F. Crane.

Examination-in-chief of H. F. CRANE on behalf of respondents.

(By Mr. MULLANY:)

Q. 1. What is your occupation?

A. I am an attorney-at-law and one of the defendants in this suit.

Q. 2. Do you know the lands involved in this suit, which are located in township three south, range three east, described in the bill of complaint?

A. I do.

Q. 3. How long have you known them?

A. I have known the lands in that township in controversy in this suit, I suppose, since about 1866.

Q. 4. Are you in possession of some of those lands in your own right?

A. Yes, sir; I am in possession, together with three other parties, of the west half of section twenty-one, in township three south, range three east.

Q. 5. Do you know all the other lands located in that township that are involved in this suit?

A. Yes; I do.

Q. 6. Did you know the condition of those lands in 1866, the value and usefulness of the lands?

A. From 1866 up to 1870 or 1871 I knew about their value.

Q. 7. Will you please state what it was during that period—that is, prior to 1870? What was their value?

(Question objected to by complainant as incompetent, irrelevant, and immaterial to any issue in this suit.)

A. From 1866 until 1871 those lands were of the value of
288 about ten dollars an acre.

Q. 8. Were they improved in any way up to 1870? And, if so, state what the character of the improvement was.

(The same objection by complainant.)

A. In 1866 or 1867, along about that time, Mr. Townsend—Moses D. Townsend—was in possession of the west half of section twenty-one and three-quarters of section twenty and forty acres in section nineteen. He had those lands enclosed by a good and substantial fence, and he had within that enclosure a house and two barns and some other outhouses; I don't remember exactly what they were.

Q. 9. Were those lands under cultivation at that time?

A. They were. They were under cultivation at that time and have been ever since.

Mr. HARDING: We make the same objections to each of those questions: that they are irrelevant, immaterial, and incompetent.

Q. 10. Will you please state what improvements, if any, have

been placed on those lands from 1870 to the present time—up to the commencement of this suit, in 1883?

(The same objection by complainant.)

A. Well, as to the particular lands that I have been just speaking of, I do not know of any other improvements having been put upon them except as to the forty acres that I spoke of. That would be the southeast quarter of the northeast quarter of section nineteen.

289 That piece of land was sold to Mr. Leberer, one of the defendants in this suit, I think, about 1880, and he has erected on this land a house and barn, and I think he has enclosed it with a fence. I am quite sure he has, and he has been in continuous possession, cultivating the land.

Q. 11. Are there any vineyards planted on this land at present?

A. Mr. Leberer has a small vineyard.

Q. 12. What is the value of these lands at the present time, irrespective of improvements and without considering them at all?

(The same objection by complainant.)

A. I think that the west half of section twenty-one is worth forty dollars an acre. I think that the lands in section nineteen claimed an- owned by Andrew Barron are worth seventy dollars an acre, and the lands in section seventeen, consisting of one hundred and twenty acres, in controversy here, or thereabouts, are of the value of fifty dollars an acre. The northeast quarter of the northeast quarter of section nineteen is some land that I own myself. There is a little more than a quarter of a quarter section there. There is about fifty acres, and that land at the present time is worth about fifty dollars an acre.

Q. 13. Are all these lands under cultivation at present?

A. They are.

Q. 14. What is being raised on them generally?

A. Well, generally grain—wheat and barley.

Q. 15. They are agricultural lands?

290 A. Agricultural lands; yes, sir. All these lands that I have spoken of in this township three south, range three east, are level lands and agricultural. I think ever- foot of them that is susceptible of being cultivated has been cultivated for the last twenty-five years.

Q. 16. State how long have the present defendants who now own these lands as claimants under State title, either through themselves or through their grantors under State title, been in possession of these lands.

A. Well, I will have to segregate them. The west half of section twenty-one has been in actual possession of the parties claiming under the State for the past twenty-two years, and I would say the same of the lands in section seventeen that are in controversy in this suit. As to the lands in section nineteen, which are in controversy, I cannot speak with so much accuracy.

Q. 17. How long have you known those lands to be possessed by persons claiming under State title?

A. Well, the difficulty about that is there was considerable litigation there with persons who were pre-emptors upon that land at one time.

Q. 16. How long since their claims have been obliterated by judication?

A. Well, I don't remember very well, but the land that Andrew Barron is now in possession of, being the northeast quarter of section nineteen and a portion of the northeast quarter of the same section, were in litigation between the State claimants and a person who claimed as pre-emptor—one John Regan. I do not think the State claimant ever got possession there until 1876 or 1877, about ten years ago.

291 Q. 19. After defeating the claims of the pre-emptor?

A. Yes; I suppose so. It was not a defeat exactly, but there was a long litigation, and finally there was a compromise.

Q. 20. Have you gone through with all of them as to your knowledge of them?

A. Yes.

Q. 21. Have you anything further that you desire to state as pertinent to the matters in issue here? And, if so, please state it.

A. Well, I have this to say, that in 1871 myself and Mr. Johnston, who was then my partner, bought a one-half undivided interest of Mr. Townsend in the land I have described as occupied by him, and we paid ten dollars an acre, I think it was, or twelve—I have forgotten which—and paid the cash for the land, and I had no knowledge at that time that there was any railroad claim to the land.

Cross-examination of H. F. CRANE.

(By Mr. HARDING:)

Q. 1. Was that the same Townsend that is mentioned in the Secretary's decision of January 15th, 1878, in the case of Townsend *et al. vs.* The Western Pacific Railroad Company, a copy of which is in evidence, marked Complainant's "Exhibit Q"?

A. I could not swear positively that it was, but I think he was the same man.

Q. 2. What was his first name?

A. Moses D. Townsend or M. D. Townsend.

292 Q. 3. Were you one of the attorneys in that case?

A. No, sir; I don't think I was. I don't remember anything about having been in that case. I am quite sure I was not, because I didn't know of any such case pending or anything about it, I think, until I heard of the decision.

Q. 4. If I show you a decision in the local land office in this city in which you are named as the attorney of Townsend and others and served by that office with notice of said decision, would you qualify your opinion?

A. Well, I might and I might not; I don't know. To what case do you refer?

Q. 5. The Townsend case. Don't you remember writing a brief in that Townsend case?

A. I do not.

Q. 6. And having it printed and serving a copy of it on me, who was at that time attorney for Regan & Smith?

A. I will say this: I remember that myself & partner were engaged in a controversy in which Mr. Regan and Mr. Smith were on one side and Mr. Arreocoechea on the other side, and Mr. Harding was counsel for Mr. Regan and Mr. Smith and myself and partner appeared for Arreocoechea. Mr. Harding has called my attention, before this, to the fact that I was attorney in the case of Townsend against The Western Pacific Railroad Company, in which case the decision of the Commissioner was made on the first day of November, 1875, and the Secretary's decision was made on January
293 15th, 1878, as he now states, but I have no recollection of ever being in that case as attorney or counsel or anything.

Q. 7. Do you remember that I was one of the attorneys in that case?

A. I do not.

Q. 8. If you did not represent, as attorney, these indemnity selections in that case, who did?

A. Really, I couldn't tell you. I know that Mr. Chapman and Mr. Moore were interested in the same land, and Mr. Gurnee sometimes attended to their cases.

Q. 9. You know you were not in that case, don't you?

A. No, sir; I do not. I must say that I am very oblivious as to who was the attorney in that case or anything about it. My best recollection is that I never knew that there was such a case pending until there was a decision, and then I wondered what sort of a case it was. Now, that is my best recollection about it.

Q. 10. Were you not also attorney for those parties in the old third district court held by Judge McKee in ejectment suits where I appeared for Regan and Smith, those parties holding these indemnity selections?

A. I do remember that I was attorney in an ejectment case in the third district court, in which I think Lloyd Levis was plaintiff and Mr. Smith & Mr. Regan were defendants.

Q. 11. Involving the possession of these same lands in sections 17 and 19?

A. Involving the right, as between Mr. Regan as pre-emptor and Mr. Lloyd Levis as the state purchaser, in the lands in con-
294 troversy, a quarter section of land in section eighteen and a quarter section of land in section nineteen. Those were the lands that were involved in that suit in the third district court. I was the attorney on the part of the State claimant, Lloyd Levis, and Mr. Harding was attorney for Mr. Smith and Mr. Regan, who were each pre-emptors on the land.

Q. 12. When did you first become interested in these indemnity locations in township three south, range three east?

A. In 1871.

Q. 13. Have you not been the attorney in all the litigation affecting those lands ever since—State or Federal?

A. Well, I presume I have, in all except that case you mentioned

of Townsend *vs.* The Western Pacific Railroad Company, and that I have no recollection of.

Q. 14. Have you not also been the attorney representing the parties holding State indemnity selections in township two south, range one east, for some years?

A. I have not, as to all the land. I have been attorney for the State claimants as to the south half of section thirty-five.

Q. 15. Since when?

A. Well, since 1871, I think, or somewhat later. I don't remember. I know it was after the land was listed to the State and patent issued that my connection with them commenced.

Q. 16. Were you not also attorney in the case of The Central Pacific Railroad Company *vs.* The State of California, in which case Complainant's Exhibits O and P were introduced, representing the holders of these indemnity selections involved in this suit?

A. You refer to the proceedings in the United States Land Office?

295 Q. 17. Yes.

A. I never was.

Q. 18. Please reflect, and say whether or not you did not file a brief or two briefs in that case, resisting the patent of said lands to the Central Pacific Railroad Company, before the Secretary of the Interior.

(Question objected to by respondents as immaterial, irrelevant, and incompetent, and not cross-examination.)

A. I should be very much surprised if any such briefs were found with my signature to them. I am positive that I never appeared in this case or had anything to do with it or any other case where the railroad company was interested, except this present suit that is now on trial.

Q. 19. I understood you to say that you had represented these State selections in township three south, range three east, as counsel for the holders of those locations ever since you bought in there..

A. Not as against the railroad company, never—until this suit.

Q. 20. Did you not also file a brief or printed argument with the Attorney General of the United States in that very case of the Central Pacific Railroad Company as to the patenting of these lands?

A. I think on the 20th day of February, 1883, I filed a very elaborate printed protest in the office of the Attorney General of the United States protesting against his allowing this suit to be brought, and that is all the brief or other paper that I have ever filed in any matter concerning railroad claims, to the best of my recollection.

296 (By Mr. MULLANY:)

Q. 21. Explain, Mr. Crane, please, how it came about or why you filed that protest in February, 1883, with the Attorney General of the United States against the order under which this suit was commenced?

(Question objected to by complainant as irrelevant and immaterial.)

A. Some time in the latter part of the administration of President Hayes I received information from Washington that an application was pending there on behalf of the railroad company and those claiming under the railroad company to have a suit brought to set aside these State titles. I immediately communicated with the Department of Justice, asking that before any such leave was granted that the settlers should have an opportunity to show cause why such leave should not be granted. In December—I think it was on the 6th—I got the papers. On the 6th of December, 1882, I received a communication from Washington stating that such application was pending, and that I should have until the 25th day of that month to file any objections to the bringing of this suit being granted by the Attorney General. I found, upon computation, that I had not the time to do it, but I took means and got the time extended until the 20th day of February. Between the 6th day of December and the 20th day of February I prepared the protest I have before spoken of, and had it printed and sent it on to Washington, and I have reason to know that it was filed in the Department of
297 Justice on either the 20th or 21st day of February, 1883, and the order directing the suit to be brought was granted on the same day or the next day; and I know that no attention was ever paid to my protest.

Mr. HARDING: We move to strike out the last answer as to the reasons of the witness for filing the protest on the ground that it is irrelevant & immaterial.

Q. 22. Have you anything else which you desire to state, Mr. Crane?

A. I will state that Mr. Armstrong purchased from me and my associates a portion of section seventeen, to the best of my recollection, about 1879, for which he paid us about thirty-five hundred dollars in cash, which land is worth to-day about fifty dollars an acre.

Q. 23. When selling that land to Armstrong did you inform him of the claim of the railroad company?

A. No, sir; I didn't know of any such claim.

Q. 24. Did he mention it to you or know of any such claim, to your knowledge?

A. No, sir; he said nothing about it.

Q. 25. Is that level land?

A. That land is level and very nice land.

Q. 26. Agricultural land?

A. Yes, sir; agricultural land.

Q. 27. How long has it been in cultivation?

A. It has been in cultivation for the last twenty years, at least.

Q. 28. Is there a dwelling-house on it?

298 A. I don't think there is. I think Mr. Armstrong's house is on another piece of land—where he lives—which is adjacent to this land spoken of.

(By Mr. HARDING:)

Q. 29. You say Mr. Armstrong did not know of the adverse railroad claim to that land?

A. So far as I know, he didn't know anything about it.

Q. 30. Did you know at that time of the railroad claim to that land?

A. Well, so far as I an personally concerned, Mr. Harding, I will state this about that: That I have known for several years past that some persons gave out that these lands ought to have gone to the railroad company, or at some time or other they intended to get them. That was a sort of general rumor that was talked around. The first that I heard of that must have been ten years ago.

Q. 31. Did the Armstrongs have counsel to examine the title to your property at the time they bought it?

A. Well, really I don't know. I don't remember.

(By Mr. MULLANY:)

Q. 32. Do you know whether the records in any place indicated at the time when you sold the lands to the Armstrongs any claim of the railroad company to the land?

A. I don't know of any such records. The records of the United States or records of the county or the records that lawyers generally consult showed that the title of the United States had passed to the State many years ago.

(By Mr. HARDING:)

299 Q. 33. I will ask you if you do not know of the decision of the Secretary of the Interior, a copy of which is in evidence in this suit, marked "Complainant's Exhibit U," rendered on the 15th of January, 1878.

A. Yes; I had heard of it, but I gave it no heed, because I knew he had no jurisdiction in the matter.

Mr. MULLANY: Respondents introduce in evidence copy, certified by the Commissioner of the General Land Office of the United States, of map filed by the Central Pacific Railroad Company in the said Land Office February 13th, 1873, together with the certificates, memoranda, affidavits, and other endorsements and appendages appearing thereon, marked "Respondents' Exhibit 56."

Mr. HARDING: I will ask counsel for what purpose the map is introduced.

Mr. CRANE: The object and purpose of introducing that map is to show that the railroad company, as late as 1873, were still declaring that the Dyer survey constituted the exterior boundaries of the Las Pocitas rancho.

Mr. HARDING: As being introduced for that purpose, we object to it as incompetent, immaterial, and irrelevant.

It is agreed by both complainant and respondents that, if called

as a witness on behalf of respondents, Henry Curtner would
300 testify substantially the same upon all points with reference to the lands claimed by him as Mr. J. West Martin did with reference to the lands claimed by said Martin, but complainant objects to it as irrelevant, immaterial, and incompetent to any issue in this suit.

Testimony closed.

Certificate of Examiner in Chancery.

I certify that the foregoing depositions were taken at the place stated in the caption to said depositions at the several times set forth in said depositions, in my presence and in the presence of counsel for the respective parties to the cause in said caption entitled; that previous to giving his testimony each of the witnesses in said depositions named was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in said cause; that said depositions were, except in so far as they were taken down in writing by the examiner, taken down in shorthand writing and transcribed by A. S. Coombs, pursuant to stipulation and agreement of counsel; that said depositions, after being so transcribed, were read by or by me to the said witnesses and signed by them respectively, except in those cases where such reading and signing were, by agreement of said counsel, waived, as in said depositions set forth, and that I have retained said depositions for the purpose of delivering the same with my own hand to the court for which they were taken.

301 Accompanying said depositions and forming part thereof are the several exhibits introduced in connection therewith and referred to and specified therein.

I further certify that I am not attorney nor of counsel for any of the parties to said cause nor in any way interested in the event thereof.

In witness whereof I have hereunto set my hand this 25th day of July, A. D. 1887.

S. C. HOUGHTON,
Examiner in Chancery, U. S. Circuit Court, Dist. of Cal.

Endorsed: Filed July 26, 1887. L. S. B. Sawyer, clerk.

302 U. S. Circuit Court, Dist. of Cal.

U. S.
vs.
CURTNER. } No. 3106.

COMP'T'S EXHIBIT A. L. C. H., Examiner.

Admissions of Allegations of Amended Bill.

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et als.*, Defendants. } No. 3106.

The allegations of the amended bill in this cause are admitted by the defendants as herein indicated and not otherwise.

1. The allegations contained in paragraphs 1, 2, 3, 4, 5, & 6, down to and including the word "Washington" in paragraph 6, are admitted to be true.

2nd. The allegations contained in paragraphs 7, 8, 9, and 10 are admitted to be true.

3rd. The allegations contained in paragraphs 12, 13, 14, 15, 16, 17, 18, 19, and 20 are admitted to be true.

4th. The allegations contained in paragraph- 22 & 23 are not admitted, except as to the facts therein stated as follows, which facts so stated are admitted to be true, viz: That said "The Union Pacific Railroad Company," said "The Central Pacific Railroad Company of California," said The Western Pacific Railroad Company, and said "The Central Pacific Railroad Company" did each do and perform all and singular the acts and conditions required to be kept, done, and performed by them by the terms of said act of Congress.

That said The Western Pacific Company's railroad and telegraph line was built and completed from its point of junction with the Central Pacific Railroad Company of California's road at said
303 city of Sacramento to a point between Sacramento and the city of San José, distant southerly one hundred and three and two-tenths ($103\frac{2}{10}$) miles from the city of Sacramento, on or before the 29th day of December, 1869.

That the lands designated in the amended bill are situate within the limits of ten miles of the line of said railroad on each side thereof as the same is completed, and that the same are designated by odd numbers and amount in the aggregate to over 2,800 acres of land and are of the value of over $50,000.

5th. The allegations contained in paragraph 24 are not admitted, except as to the facts therein stated as follows, which facts so stated are admitted to be true, viz:

That said lands were at the several dates mentioned in the amended bill by the Commissioner of the General Land Office of the United States listed and certified over to the State of California,

and that said lands amounted to the number of twenty-eight hundred and sixty-seven and $\frac{10}{100}$ (2,867$\frac{10}{100}$) acres of land.

6th. That the allegations contained in paragraph 26 are admitted to be true.

7th. The allegations contained in paragraphs 25 and 29 are not admitted, except as to the facts therein stated as follows, which facts so stated are admitted to be true, viz:

That on the 12th day of May, 1874, the Central Pacific Railroad Company," by its land agent, one Charles J. Torbet, the duly authorized agent of said company, presented to the register and receiver of the U. S. land office at San Francisco his list No. 13, embracing the
304 lands in controversy in this suit, and requested said register and receiver to certify as follows, to wit: That they had carefully and critically examined said list of lands, and had tested the accuracy of the same by the plats and records of their office, and had found the same to be correct, and that the whole of said lands were surveyed public lands of the United States within the limits of ten miles on each side of said railroad, and that none of the same were mineral lands, nor was there any homestead, pre-emption, State, or other valid claim to any portion of said land on file or of record in said office, and that the filing of said list is approved by them; that the fees of said register and receiver were then and there paid by said agent; that the register and receiver refused to certify said list as aforesaid requested for the reason that their records then showed that said lands had been certified over to the State of California; that said railroad company then appealed said matter from said refusal to so certify to the Commissioner of the General Land Office, and such proceedings were had in said matter that on the 9th day of March, 1878, said Commissioner made and signed a written document whereby he purported to decide and adjudge that said railroad company had the better right to the lands in controversy herein; that thereafter and on the 26th day of June, 1879, the Secretary of the Interior signed a written document wherein and whereby he purported to affirm the said decision of the Commissioner, but at the same time refused to permit patents to issue to said railroad company for the reason that said land had been certified over to the State of California; that on the
305 25th of February, 1878, the Commissioner of the General Land Office caused demand to be made upon the State of California for the surrender of the title to said land, which the State refused to do.

That on the 22nd of April, 1880, said railroad company, by its attorneys, made application by petition to the Secretary of the Interior for a reconsideration of so much of his aforesaid decision as refused to issue patents to said railroad company for said land.

That on the 18th of October, 1882, the Secretary of the Interior directed the Commissioner of the General Land Office to prepare the necessary papers and documents with a view to the commencement of a suit to annul and set aside the listing and certification of said land to the State of California, and on the 6th day of December,

1882, the Secretary of the Interior requested the Attorney General of the United States to commence suit for that purpose.

H. F. CRANE,
Solicitor for Defendants.

(Endorsed:) Filed July 26, A. D. 1887. L. S. B. Sawyer, clerk.

306 United States Circuit Court, Dist. of Cal.

U. S. v. CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT C. S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of a letter addressed to the register and receiver, San Francisco, California, December 23d, 1864, is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
[L. S.] *Commissioner of General Land Office.*

Order Withdrawing Lands from Pre-emption, Private Entry, and Sale.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 23*d*, 1864.

Register & receiver, San Francisco, California.

GENTL.: I enclose herewith a map of the general route of the Western Division of the Central Pacific railroad within your district. The line of railroad from Sacramento to San Francisco, by way of Stockton and San José, and the limits of the same are indicated on the map by red color. The limits of your district south and east are indicated by green shade. Upon the receipt of this letter you will withdraw from sale, location, pre-emption, and homestead the vacant odd-numbered sections and parts of sections within 25 miles on each side of said road as indicated by the diagram herewith.

307 The even-numbered sections within said limits will be subject to homestead and pre-emption, but not subject to private entry or location. Where said route passes through the surveyed land, the register will proceed at once to lay down in lead pencil, on the township plats so far as returned to his office, the 25-mile limits of the reserve on each side of said route, and make the proper notes thereon showing that the lands embraced within said limits are re-

served as aforesaid, and as surveys come in he will proceed in like manner to lay down the limits of the reservation and make similar notes thereon and immediately report the same to this office, so that this order may be strictly observed in withholding the lands as herein directed.

This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you.

Very respectfully, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

(Endorsed:) Filed July 26, A. D. 1887. L. S. B. Sawyer, clerk.

308 U. S. Circuit Court, Dist. of Cal.

U. S.
v. } 3106.
CURTNER.

COMPLAINANT'S EXHIBIT E. S. C. H., Examiner.

List by which Lands were Certified Over to State.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed abstract copy of list No. 18, now on file in this office, of State indemnity school selections of lands in the San Francisco district, California, approved September 8, 1870, is a true and literal exemplification of that portion of said list to which it relates.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] N. C. McFARLAND,
Commissioner of General Land Office.

GENERAL LAND OFFICE, *Sept.* 8, 1870.

The tracts in the following list have been critically examined and are found to be free from conflicts and to inure to the State for the purpose indicated.

B. T. REILLY.
J. J. BARNS.

309 List No. 18 of indemnity school selections, exhibiting the tracts of public lands situate in the district of lands subject to sale at San Francisco, California, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the act of Congress approved March 3rd, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes;" February 26th, 1859, entitled An act to authorize settlers upon sixteenth and thirty-sixth sections, who settled before the surveys of the public land-, to pre-empt their settlements, and July 23d, 1866, entitled "An act to quiet land titles in California."

By which lands were certified over to State of California.

Description—Portions sec. 16 & 36 lost to the State.							Selections to supply deficiency in school land.						
Town.	Range.	Town.	Range.	Description.	Sec.	Area.	Sec.	Town.	Range.	Area.	No. of application.	Date of selection.	
*	*	*											
25 S.	16 E.	M. D.		W. ½	16	320.00	N. ½	1	2 S.	1 E.	306.83	335	June 13th, 1865.
*	*	*											
8 N.	33 W.	S. B.		S. E. ¼	16	160	N. W. ¼	3	"	"	154.77	319	" " "
18 S.	7 E.	M. D.		N. W. ¼	36	160	S. E. ¼	3	"	"	160	336	" " "
9 N.	35 W.	S. B.		S. E. ¼	16	160	N. E. ¼	5	"	"	160	321	" " "
2 S.	2 W.	M. D.		N. E. ¼ and N. ½ S. E. ¼	16	240	S. E. ¼ and E. ½ S. W. ¼	5	"	"	240	313	" " "
*	*	*											
22 S.	6 E.	M. D.		E. ½	16	320	E. ½	13	"	"	314.58	333	" " "
10 N.	19 W.	S. B.		N. W. ¼	36	160	N. E. ¼	15	"	"	160	303	" 12, "
23 S.	7 E.	M. D.		S. ½	16	320	E. ½	21	"	"	305.60	299	" " "
4 S.	1 E.	"		N. E. ¼	16	160	N. E. ¼	33	"	"	155.04	302	" " "
*	*	*		* *	*	*	* *	*	*				
3 S.	2 W.	M. D.		E. ½	16	320	N. ½	35	"	"	320	305	" " "
4 S.	1 E.	"		W. ½	16	320	S. ½	35	"	"	320	310	" " "

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Sept. 8th*, 1870.

It is hereby certified that the tracts in this list are embraced in the original lists now on file in this office of lands selected in
310 the San Francisco district, State of California, as indemnity for deficiencies in the township named, which indemnity school selections are authorized in the above-cited acts of Congress of March 3, 1853, February 26, 1859, and July 23, 1866.

It is further certified that the said tracts have been examined and compared with the township plats and tract books of this office, and that the indemnity is properly due to the townships for which selected; are found to be subject to selection and free from conflict, and it is therefore recommended that the list be approved, subject to any valid interfering rights which may have existed at the date of selection.

JOS. S. WILSON,
Commissioner.

DEPARTMENT OF THE INTERIOR, *8th Sept.*, 1870.

The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

J. D. COX, *Secretary.*

(Endorsed:) Filed July 26, A. D. 1887. L. S. B. Sawyer, clerk.

311 U. S. Circuit Court of Cal.

U. S.
vs. } No. 3106.
CURTNER.

COMPLAINANT'S EXHIBIT F. S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *December 2d*, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed abstract copy of list No. 20, now on file in this office, of State indemnity school selections of lands in the San Francisco district, California, approved March 11th, 1871, is a true and literal exemplification of that portion of said list to which it relates.

In testimony whereof I have hereunto subscribed my
[L. S.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

GENERAL LAND OFFICE, *9th March*, 1871.

The tracts described in the following list have been critically examined and are found to be free from conflict and to inure to the State for the purposes indicated.

M. MOBLEY.
J. J. BARNES.

312 List No. 20 of indemnity school selections, exhibiting the tracts of public lands situate in the district of lands subject to sale at San Francisco, California, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided in the act of Congress approved March 3rd, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes;" February 26th, 1859, entitled "An act to authorize settlers upon sixteenth and thirty-sixth sections, who settled before the surveys of the public lands, to pre-empt their settlements," and July 23rd, 1866, entitled "An act to quiet land titles in California."

By which lands were certified over to State of California.

Description—Portions sec. 16 & 36 lost to the State.						Selections to supply the deficiency in school lands to which townships are entitled.						
Town.	Range.	Town.	Range.	Description.	Sec.	Area.	Description.	Sec.	Town.	Range.	Area.	No. of application.	Date of selection.
*	*	*		* *	*	*	* *	*	*	*	*	*	*
27 S.	11 E.	M. D.	----	S. E. ¼ N. E. ¼	16	40.00	S. E. ¼ S. E. ¼	9	2 S.	1 E.	29.48	328	June 13th, 1865.
2 S.	1 W.	"	----	S. W. ¼	16	160	S. E. ¼	11	"	"	160.00	324	" " "
2 S.	2 W.	"	----	W. ½	16	320	W. ½	13	"	"	318.18	301	" " "
28 S.	10 E.	"	----	Frl. S. ½	36								
27 S.	11 E.	"	----	N. E. ¼ N. E. ¼	16	------	W. ½	15	------	------	320	327	" " "
12 N.	29 W.	S. B.	----	and frl. S. ½	36								

313 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *9th March*, 1871.

It is hereby certified that the tracts described in the foregoing list are embraced in the original lists now on file in this office of lands selected in the San Francisco district, State of California, as indemnity for deficiencies in the townships named, which indemnity school selections are authorized in the above-cited acts of Congress of March 3, 1853, February 26, 1859, and July 23rd, 1866.

It is further certified that the said tracts have been carefully examined and compared with the township plats and tract books of this office, and that the indemnity is properly due to the townships for which selected; are found to be free from conflict and subject to selection, and it is therefore recommended that the list be approved, subject to any valid interfering rights which may have existed at the date of selection.

WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR, *11th March*, 1871.

The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

C. DELANO, *Secretary.*

(Endorsed:) Filed July 26th, 1887. L. S. B. Sawyer, clerk.

314 U. S. Circuit Court, Dist. of Cal.

U. S.
v. } 3106.
CURTNER.

COMPLAINANT'S EXHIBIT G. S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAN- OFFICE, *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed abstract copy of list No. 23, now on file in this office, of State indemnity school selections of lands in the San Francisco district, California, approved November 15, 1871, is a true and literal exemplification of that portion of said list to which it relates.

In testimony whereof I have hereunto subscribed my
[L. S.] name and caused the seal of the office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner General Land Office.

GENERAL LAND OFFICE, *15th Nov.*, 1871.

The tracts described in the following list have been critically examined and are found to be free from conflict and to inure to the State for the purposes indicated.

M. MOBLEY.
JAS. J. BARNES.

315 List No. 23 of indemnity school selections, exhibiting the tracts of public lands situated in the district of lands subject to sale at San Francisco, California, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the act of Congress approved March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes;" February 26, 1859, entitled "An act to authorize settlers upon sixteenth and thirty-sixth sections, who settled before the surveys of public lands, to pre-empt their settlements," and July 23, 1866, entitled "An act to quiet land titles in California."

By which lands were certified over to State of California.

Description—Portions 16 & 36 sects. lost to State.							Selections to supply deficiency in school lands to which townships are entitled.						
Town.	Range.	Town.	Range.	Description.	Sec.	Area.	Description.	Sec.	Town.	Range.	Area.	No. of application.	Date of selection.
*	*			* *	*	*	* *	*	*	*			
10 N.	4 W.	M. D.		S. E. ¼	36	160	Lots 1, 2, & W. ½ N. W ¼	1	3 S.	1 E.	161.73	2,624	July 22d, 1871.
*	*	*		* *	*	*	* *	*	*	*	*	*	
1 S.	4 E.	"		E. ½ N. E. ¼ & N. W. ¼ N. E. ¼	36	120	S. W. ½ S. E. ¼ & S. ½ S. W. ¼	17	3 S.	3 E.	120	156	May 16th, 1864.
*	*	*		* *	*	*	* *	*	*	*	*		
"	"	"		S. W. ¼ N. E. ¼	36	40	S. E. ¼ N. E. ¼	19	"	"	40	156	" " "
4 S.	2 E.	"		N. E. ¼	16	160.00	N. W. ¼	21	"	"	160	2,138	Jan. 24, 1869.
1 S.	4 W.	"		S. W. ¼	36	160.00	S. W. ¼	21	"	"	160	72	May 22, 1863.

316 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, 15*th Nov.*, 1871.

It is hereby certified that the tracts described in the foregoing list are embraced in the original lists now on file in this office of lands selected in San Francisco district, California, as indemnity for deficiencies in the townships named, which indemnity school selections are authorized in the above-cited acts of Congress of March 3, 1853; February 26, 1859, and July 23, 1866. It is further certified that the said tracts have been examined and compared with the township plats and tract books of this office, and that the indemnity is properly due the townships for which selected; are found to be subject to selection and free from conflict, and it is therefore recommended that the list be approved, subject to any valid interfering rights which may have existed at the date of selection.

WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR, 15*th Nov.*, 1871.

The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

C. DELANO, *Secretary.*

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

317 U. S. Circuit Court, Dist. of Cal.

U. S.
vs. } 3106.
CURTNER.

COMPLAINANT'S EXHIBIT H. S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed abstract copy of list No. 25, now on file in this office, of State indemnity school selections of lands in the San Francisco district, California, approved March 24, 1873, is a true and literal exemplification of that portion of said list to which it relates.

In testimony whereof I have hereunto subscribed my
[L. S.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

GENERAL LAND OFFICE, *March* 21, 1873.

The tracts embraced in the following list have been carefully examined and are found to be free from conflicts and to inure to the State for the purposes indicated.

J. J. BARNES.

318 List No. 25 of indemnity school selections, exhibiting the tracts of public lands situated in the district of lands subject to sale at San Francisco, California, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the act of Congress approved March 3, 1853, entitled "An act to provide for the survey of the public land- in California, the granting of pre-emption rights therein, and for other purposes;" February 26, 1859, entitled "An act to authorize settlers upon sixteenth and thirty-sixth sections, who settled before the surveys of the public lands, to pre-empt their settlements," and July 23, 1866, entitled "An act to quiet land titles in California."

By which lands were certified over to State of California.

Description—Portions of 16th & 36th sects. lost to State.							Selections to supply the deficiency in school lands to which townships are entitled.						
Town.	Range.	Town.	Range.	Description.	Sec.	Area.	Description.	Sec.	Town.	Range.	Area.	No. of application.	Date of application.
*	*	*		* *	*	*	* *	*			*	*	*
*	*	*		* *	*	*	* *	*			*	*	*
17 S.	11 E.	M. D.	----	N. ½ ----------	36	320	N. E. ¼ N. E. ¼, W. ½ N. E. ¼, and N. W. ¼	19	3 S.	3 E.	289.19	110	June 25, 1863.
*	*	*		* *	*		* *	*					*
*	*	*		* *	*	*	* *	*					*

319 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 21, 1873.

It is hereby certified that the tracts described in the foregoing list are embraced in the original lists now on file in this office of lands selected as indemnity for deficiencies in the townships named, which indemnity school selections are authorized in the above-cited acts of Congress of March 3, 1853; February 26, 1859, and July 23, 1866.

It is further certified that the said tracts have been examined and compared with the township plats and tract books of this office, and that the indemnity is properly due to the townships for which selected; are found to be subject to selection and free from conflicts, and it is therefore recommended that the list be approved, subject to any valid interfering rights which may have existed at the date of selection.

WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR, 24*th March*, 1873.

The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

C. DELANO, *Secretary.*

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

320 U. S. Circuit Court, Dist. of Cal.

U. S.
vs. } 3106.
CURTNER.

COMPLAINANT'S EXHIBIT I. S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of selections of lands in San Francisco district, of California, made May 12, 1874, by Charles J. Torbet, deputy land agent of the Central Pacific Railroad Company, is a true and literal exemplification of the original list on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

Appointment of Chas. J. Torbert Deputy Land Ag't C. P. R. R. Co.

Office of the Central Pacific Railroad Company.

SAN FRANCISCO, CALIFORNIA, *May 12th, A. D.* 1874.

I, Edward H. Miller, Jr., secretary of the Central Pacific Railroad Company (successor to the "Central Pacific Railroad Company of California" and the "Western Pacific Railroad Company," consolidated), hereby certify that Charles J. Torbert was appointed deputy land agent of the said "Central Pacific Railroad Company," successor, by consolidation, to the said "The Western Pacific Railroad Company," by the board of directors of said company at a regular meeting held on the ninth (9th) day of May, A. D. 1873, and that since that time he has been continously and is now the deputy land agent of said company.

321 In testimony whereof I have hereunto set my hand and affixed the corporate seal of said company this 12th day of May, A. D. 1874.

[SEAL.]

EDWARD H. MILLER, JR.,
Secretary of the Central Pacific Railroad Company.

List of Proposed Selections on Behalf of C. P. R. R. Co.

STATE OF CALIFORNIA,
United States Land Office, City and County of San Francisco.

"The Central Pacific Railroad Company," successor to the "Central Pacific Railroad Company of California" and the "Western Pacific Railroad Company," consolidated, under and by virtue of the acts of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and the acts amendatory thereof, approved July 2nd, 1864, and March 3d, 1865, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office and contained in a circular dated January 24th, 1867, hereby makes and files the following list of selections of public lands claimed by the said "Central Pacific Railroad Company," successor to the said "The Western Pacific Railroad Company," as inuring to it and to which it is entitled under and by virtue of the grants and provisions of the said acts of Congress and the location of the line of route of the road of said "The Western Pacific Railroad Company," being for a section of one hundred and twenty-three and $\frac{38}{100}$ miles of said road, commencing at the city of San José, in Santa Clara county, and ending at the one hundred and twenty-third and $\frac{38}{100}$ miles of said

322 railroad, at its junction with the "Central Pacific railroad," at the American River bridge, in Sacramento county:

Part of section.	No. of section.	No. of town.	No. of range.	Area.		Fees of register & receiver.
				Acres.	100.	
N. ½ fract'l	1	2 south	1 east	306	83	
Lots No. 1 & 2 of N. W. ¼ S. E. ¼	3	2 "	1 east	317	77	
Lots 1 and 2 of N. E. ¼ S. E. ¼, E. ½ of S. W. ¼	5	2 south	1 east	397	13	
S. E. ¼ of S. E. ¼ fract'l	9	2 south	1 east	29	48	
N. W. ¼ S. ½	11	2 south	1 east	480		
All of fract'l	13	2 south	1 east	632	76	
N. E. ¼ W. ½	15	2 south	1 east	480		
E. ½ fract'l	21	2 south	1 east	305	60	
Lots 1 & 2 E. ½ of N. E. ¼	33	2 south	1 east	155	04	
All	35	2 south	1 east	640		
Lots 1 & 2 W. ½ of N. W. ¼, S. ½ of S. W. ¼	1	3 south	1 east	161	73	
S. W. ¼ of S. E. ¼	17	3 south	3 east	120		
N ½ fract'l	19	3 south	3 east	329	17	
W. ½	21	3 south	3 east	320		
Total acres				4,675	51	

323 STATE OF CALIFORNIA, *City and County of San Francisco,* } *ss:*

I, Charles J. Torbert, being duly sworn, depose and say that I am the deputy land agent of the "Central Pacific Railroad Company" (successor to the "Central Pacific Railroad Company of California" and "The Western Pacific Railroad Company," consolidated); that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said "Central Pacific Railroad Company," successor to the said "The Western Pacific Railroad Company," as inuring to said company to aid in the construction of "The Western Pacific railroad," for which a grant of land was made by the acts of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and acts amendatory thereof, approved July 2d, 1864, and March 3d, 1865; that the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands and are of the character contemplated by the grant, lying within the limit of twenty (20) miles on each side of the line of route of said road, being for a section of one hundred and twenty-three and $\frac{38}{100}$ miles of said road, commencing at the city of San José, in Santa Clara county, and ending at the one hundred and twenty-third and $\frac{38}{100}$ mile of said road, at its junction with the "Central Pacific railroad," at the American River bridge, in Sacramento county.

324 CHARLES J. TORBERT.

Subscribed and sworn to before me this twelfth day of May, A. D. 1874.

WILLIAM KARNEY,
County Clerk, City and County of San Francisco, California, and Clerk 12th District Court Thereof.

Form of Certificate Proposed for Signature to Register & Receiver of U. S. Land Office.

UNITED STATES LAND OFFICE,
SAN FRANCISCO, CALIFORNIA, *May 8th, A. D.* 1874.

We hereby certify that we have carefully and critically examined the foregoing list of the lands claimed by the "Central Pacific Railroad Company" (successor by consolidation to "The Western Pacific Railroad Company") under the grants to them by the acts of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and the acts amendatory thereof, approved July 2d, 1864, and March 3d, 1865, and selected by Charles J. Forbert, the duly authorized deputy land agent of said "Central Pacific Railroad Company," successor by consolidation to the said "The Western Pacific Railroad Company," and we have tested the accuracy of said list by the plats and records of this office, and we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United
325 States and within the limits of twenty (20) miles on each side, and that the same are not nor is any part thereof returned and denominated as mineral lands or land, nor claimed as swamp land, nor is there any homesteads, pre-emptions, State, or other valid claim to any portion of said lands on file or record in this office. We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the act of Congress approved July 1st, 1864, and contemplated by the instruction dated January 24th, 1867, and addressed by the Commissioner of the General Land Office to the register and receiver of United States land offices, and that the said Central Pacific Railroad Company, successor by consolidation to the "Western Pacific Railroad Company," have paid to the undersigned the full sum of —— dollars in full payment and discharge of said fees.

REGISTER OF U. S. LAND OFFICE,
San Francisco, California.
RECEIVER OF U. S. LAND OFFICE,
San Francisco, California.

Certificate Signed Signed *by Register & Receiver.*

UNITED STATES LAND OFFICE, SAN FRANCISCO,
DISTRICT OF CALIFORNIA, *May 16th*, 1874.

We, the undersigned register and receiver, hereby certify that all

the statements contained in the annexed certificate are true except so much thereof as has reference to adverse claims and the payment of fees to the receiver. We refuse to sign the same for the
326 reason that the land contained in said list No. 13 has been listed by the hon. Sec'ty of Interior to the State of California under selections made by said State, and the receiver refuses to receive the fees, though duly tendered, for the same reason.

H. G. ROLLINS, *Register.*
CHAS. H. CHAMBERLAIN, *Receiver.*

Certificate of Surv. Gen'l as to Deposit for Surveys.

UNITED STATES SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CALIFORNIA, *June 3rd, A. D.* 1874.

I, Jas. T. Stratton, surveyor general of the United States in and for the State of California, hereby report and certify that "the Central Pacific Railroad Company," successor by consolidation to "the Western Pacific Railroad Company," has this day filed with me, at San Francisco, California, a duplicate certificate of deposit, No. 100, dated June 3d, A. D. 1874, to the credit of the Treasurer of the United States, showing that the sum of one hundred and ninety-six dollars has been deposited as cost of survey and thirty-four dollars for office work for the lands mentioned and described in the list of lands hereto annexed to the extent of said list.

Survey	$196
Office work	34
	$230

[SEAL.] In testimony whereof I have hereunto set my hand and official seal the day and year first above written.

JAS. T. STRATTON,
U. S. Surveyor General for California.

327 (Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cala.

U. S.
v.
CURTNER. } 3106.

COMPLAINANT'S EXHIBIT J. S. C. H., Examiner.

JUNE 3RD, 1874.

Hon. Commissioner Gen'l Land Office.

SIR: We forward herewith list No. 13 of lands selected by the C. P. R. R. Co., successor by consolidation to the W. P. R. R. Co. The said list was offered for our approval on the 16th ult., but we refused to certify because all the lands embraced therein has been listed to the State of California.

Tully R. Wise, att'y for said Co., filed in this office on the 30th ult. an appeal from said refusal to certify, and the same is also forwarded herewith.

We also forward herewith our certificate as to the condition of the land embraced in said list.

Very respectfully your ob't serv't,

H. G. ROLLINS, *Register.*

I hereby certify the foregoing to be a full, true, & correct copy of the original now on file in this office.

A. C. BRADFORD, *Register.*

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

328 U. S. Circuit Court.

U. S. *v.* CURTNER. } No. 3106.

COMPLAINANT'- EXHIBIT K. S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of a letter addressed to the register and receiver, San Francisco, California, March 9th, 1878, is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my [L. S.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

Opinion of Hon. J. A. Williamson as to the Rights of the R. R. Co. and the State.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 9, 1878.

Register and receiver, San Francisco, California.

GENTLEMEN: I have considered the appeal of the Central Pacific Railroad Company, successor by consolidation to the Western Pacific Railroad Company, from your decision of May 16, 1874, refusing to certify as proper selections certain lands embodied in list No. 13, dated May 12, 1874, because they had been approved to the State of California as indemnity selections for school purposes, said lands with the dates of their selection by and approval to the State being as follows: The N. ½ section 1, township 2 south, range 1 east,

M. D. M., 306.83 acres, selected by the State June 13, 1865;
329 R. & R., 335; approved Sept. 8, 1870; list No. 18. The lots Nos. 1 and 2, N. W. ¼ section 3, township 2 south, range 1 east, 154.77 acres, selected June 13, 1865; R. & R., 319; approved Sept. 8, 1870; list No. 18. The S. E. ¼ section 3, township 2 south, range 1 east, 160 acres, selected June 13, 1865; R. & R., 336; approved Sept. 8, 1870; list No. 18. Lots 1 & 2 of N. E. ¼ section 5, township 2 south, range 1 east, 157.13 acres, selected June 13, 1865; R. & R., 321; approved Sept. 8, 1870; list No. 18. The S. E. ¼ section 5, township 2 south, range 1 east, 160 acres, selected June 13, 1865; R. & R., 313; approved Sept. 8, 1870; list 18.

The E. ½ S. W. ¼ section 5, township 2 south, range 1 east, 80 acres, selected June 13, 1865; R. & R., 313; approved Sept. 8, 1870; list 18. The S. E. ¼ S. E. ¼ section 9, township 2 south, range 1 east, 29.48 acres, selected June 18, 1865; R. & R., 328*a*; amended October 18, 1870; R. & R., 2544; approved March 11, 1871; list No. 20. The N. W. ¼ section 11, township 2 south, range 1 east, 160 acres, selected June 12, 1865; R. & R., 300*a*; approved Sept. 8, 1870; list 18. The S. E. ¼ section 11, township 2 south, range 1 east, 160 acres, selected June 13, 1865; R. & R., 324*a*; amended Oct. 13, 1870; R. & R., 2545; approved March 11, 1871; list 20. The S. W. ¼ section 11, township 2 south, range 1 east, 160 acres, selected June 13, 1865; R. & R., 324*a*; amended Oct. 13, 1870; R. & R., 2345; reselected October 20, 1871; R. — R., 2677; amended June 17, 1872; R. & R., 2829; approved April 18, 1873; list 26.

The E. ½ section 13, township 2 south, range 1 east, 314.38 acres, selected June 13, 1865; R. & R., 333*a*; approved Sept. 8,
330 1870; list 18. The W. ½ section 13, township 2 south, range 1 east, 318.18 acres, selected June 12, 1865; R. & R., 301*a*; amended Oct'r 26, 1870; R. and R., 2554; approved March 11, 1871; list 20. The N. E. ¼ section 15, township 2 south, range 1 east, 160 acres, selected June 12, 1865; R. & R., 303; approved Sept. 8, 1870; list 18. The W. ½ section 15, township 2 south, range 1 east, 320 acres, selected June 13, 1865; R. & R., 327*a*; amended Oct'r 13, 1870; R. & R., 2543; approved March 11, 1871; list No. 20. The E. ½ section 21, township 2 south, range 1 east, 305.60 acres, selected June 12, 1865; R. & R., 299; approved Sept. 8, 1870; list 18. Lots 1 and 2 and E. ½ N. E. ¼ section 33, township 2 south, range 1 east, 155.04 acres, selected June 12, 1865; R. & R., 302; approved Sept. 8, 1870; list 18. All of section 35, township 2 south, range 1 east, 640 acres, selected June 12, 1865; R. & R., 305 & 310; approved Sept. 8, 1870; list 18. Lots 1 & 2 and W. ½ N. W. ¼ section 1, township 3 south, range 1 east, 161.73 acres, selected July 22, 1871; R. and R., 2624; approved November 15, 1871; list 23. The S. ½ S. W. ¼ section 17, township 3 south, range 3 east, 80 acres, selected May 16, 1864; R. & R., 156; reselected June 18, 1869; R. and R., 2117; approved November 15, 1871; list 23. The S. W. ¼ S. E. ¼ section 17, township 3 south, range 3 east, 40 acres, selected May 16, 1864; R. and R., No. 156; reselected June 18, 1869; R. & R., 2117; approved Nov. 15, 1871; list 23. The S. E. ¼ N. E. ¼ section 19, township 3 south, range 3 west, 40 acres, selected May 16, 1864;

R. & R., 156; reselected June 18, 1869; R. and R., 2117; approved Nov. 15, 1871; list 23. The N. E. ¼ N. E. ¼, W. ½ N. E. ¼, and N. W. ¼ section 19, township 3 south, range 3 east, 289.19 acres,
331 selected June 25, 1863; R. & R., 110; approved March 24, 1873; list 25. The N. W. ¼ section 21, township 3 S., R. 3 east, 160 acres, selected May 22, 1863; R. and R., 73; reselected June 24, 1869; R. & R., 2138; approved Nov'r 15, 1871; list No. 23. The S. W. ¼ section 21, township 3 south, range 3 east, 160 acres, selected May 22, 1863; R. & R., 72; reselected June 18, 1869; R. & R., 2121; approved Nov'r 15, 1871; list No. 23. These lands are all within the ten-mile limits of the Western Pacific railroad grant; withdrawal ordered by letter of December 23, 1864; received at San Francisco January 30, 1865; right of road attached March 28—May 10, 1868. The plat of township 2 south, range 1 east, was filed in your office June 10, 1865; that of township 3 south, range 1 east, April 24, 1871, and, according to the decision of the Secretary of the Interior January 15, 1878, in the case of The State of California *vs.* M. D. Townsend *et al.*, the plat of township 3 south, range 3 east, is considered to have been filed with you June 4, 1869. In the case of The State of California against Townsend and others just refer-ed to some of the questions herein presented were involved, and it was there held by the Secretary of the Interior on appeal, 1, that in accordance with the decision of the Supreme Court of the United States in the case of Newhall *vs.* Sanger the grant to the Western Pacific Railroad Company became, by the withdrawal of January 30, 1865, effective upon all lands in odd-numbered sections within its limits, except such as had been sold or otherwise disposed of at that time or were reserved for other purposes.

2. That lands within the boundaries of the Lewis survey of
332 the Rancho Los Pocitas were reserved for other purposes at the time of the withdrawal for the benefit of the railroad grant, and under the Newhall-Sanger decision did not inure to the grant upon their release from reservation by the final adjustment of the Los Pocitas rancho claim.

3. That the act of Congress approved July 23, 1866, confirmed State selections within the boundaries of the Lewis survey when such lands were thrown outside of the confirmed and adjusted limits of the rancho, and where all the proofs required by the act were made.

4. That State selections of unsurveyed lands *lands* in odd-numbered sections within the limits of the railroad withdrawal of January 30, 1865, outside of the boundaries of the Lewis survey, made subsequent to July 1, 1862, were void at the time they were made and at the time the railroad grant took effect, and were not confirmed by the act of July 23, 1866. Such lands were declared to have inured to the railroad grant, and those then in question were awarded to the company, notwithstanding their selection by and certification to the State. By that decision the lands covered by the railroad selection in township 3 south, range 3 east, were disposed of, those within the limits of the Lewis survey remaining to

the State, and those without such limits being awarded to the company. The tracts within the Lewis survey are:

					Acres.
Lot 13 (in S. W. ¼ of S. W. ¼),	sec.	17,	T. 3 S.,	R. 3 E.	2.74
" 3 (in N. W. ¼ of N. E. ¼),	"	19,	"	"	9.69
Part of lot (in E. ½ of N. W. ¼),	"	19,	"	"	33.63
Part of lot 2 (in W. ½ of N. W. ¼),	"	19,	"	"	44.59 / 23.77 — 68.36
Lot 6 (in S. E. ¼ of N. W. ¼),	"	19,	"	"	1.05
In all					115.47

333 The selections of those lands by the company was not proper and your action in refusing to certify the same as lands to which the company is entitled is affirmed. Of the lands embraced in the Townsend case the following-named embodied in the list of railroad selections now under consideration lie outside of the Lewis survey and were awarded to the railroad company:

		Acres.
S. E. ¼ S. W. ¼	sec. 17, T. 3 S., R. 3 E.	40.
Lot 14 (of S. W. ¼ of S. W. ¼),	sec. 17, T. 3 S., R. 3 E.	37.26
S. W. ¼ S. E. ¼	" " " "	40.00
S. E. ¼ N. E. ¼	section 19, T. 3 S., R. 3 E.	40.00
N. E. ¼ N. E. ¼	" " "	40.00
Lot 4 (of N. W. ¼ N. E. ¼),	" " "	30.31
S. W. ¼ N. E ¼	" " "	40.00
Lot 5 (of N. E. ¼ of N. W. ¼),	" " "	6.37
Part of lot 1 of E. ½ of N. W. ¼	" " "	38.95
Lot 7 of S. W. ¼ of N. W. ¼	" " "	20.81
West ½ of section 21, town. 3 S., R. 3 E.		320.00
In all		653.70

In transmitting the decision of the Secretary in the case, January 20, ult., you were directed to request the State authorities to relinquish all the lands awarded to the company except the N. E. ¼ N. E. ¼ and S. W. ¼ N. E. ¼ sect. 19, which were inadvertently omitted from the list sent you. The selections by the company of the lands in sections 17, 19, and 21, township 3 south, range 3 east, 653.70 acres, as described, will be permitted and recognized when properly made.

334 The remaining selections by the company, amounting to 3,903.34 acres, are for lands in townships 2 and 3 south, range 1 east, lying outside of the Lewis survey.

In the Townsend case the State selections of lands outside of the Lewis survey were made prior to survey and withdrawal. The Secretary held that such selections were not confirmed by the act of July 23, 1866, because they were void at the time they were made and at the time the railroad grant took effect; that at the date of the approval of the act of July 23, 1866, the lands had inured to the

railroad grant, and it was therefore impossible for Congress to confirm them to purchasers from the State, because the Government had ceased to exercise control over them and had no interest which it could then bestow. In this case the selections by the State of the lands in townships 2 and 3 south, 1 east, were all made subsequent to the withdrawal of the lands for railroad purposes and after the survey of the townships and the reception of the plats at your office. They were void from inception, the lands having been legally appropriated under the railroad grant at the time they were made, and were permitted under misapprehension or in disregard of the instructions of the letter of December 23, 1864, withdrawing the lands. If the act of July 23, 1866, did not confirm void selections for lands outside of the Lewis survey made for unsurveyed lands prior to the withdrawal for railroad purposes it certainly did not confirm void selections of such lands made after survey and reception of the plats and after the right of the
335 company under its grant had vested by the withdrawal of the lands for the benefit of the grant. These State selections were therefore not confirmed by the act of July 23, 1866, and their subsequent approval was consequently erroneous. Unless other objections intervene the lands are properly subject to selection by the railroad company. The records of this office show that the company's selections conflict with the following claims:

S. E. ¼ N. W. ¼ section 3, township 2 south, range 1 east, embraced in pre-emption warrant location of Harrison Finley, March 21, 1866. Lots 1 and 2 and W. ½ N. W. ¼ section 1, town. 3 south, range 1 east, are covered by declaratory statement of James McDonald, No. 7598, filed July 1, 1871, alleging settlement June 6, 1871. So far as is known no attempt has ever been made by McDonald to follow up his declaratory statement with entry of the land. His settlement, as alleged, is subsequent to the withdrawal, and it is apparant that he can have no rights thereunder as against the company. His filing is therefore held for cancellation. Finley filed D. S. 2412 September 19, 1865, for the S. W. ¼ of section 3, T. 2 S., R. 1 E., alleging settlement March 3, 1864; amended the same by D. S. 2854 to cover the S. E. ¼ N. W. ¼ with the N. ½ S. W. ¼ and S. E. ¼ S. W. ¼. Notice of his intention to make proof and payment was given the State and railroad company and acknowledged by them, and on March 21, 1866, he offered due proof and tendered as payment for
336 the land military bounty land warrant No. 22995, act of September 28, 1850, which was accepted and located per R. & R. 312. Patent issued thereon July 10, 1867. The land was, however, erroneously included in list No. 18 of indemnity school selections, approved to the State September 8, 1870. Finley's rights clearly antedates those of the railroad company, and its selection of the S. E. ¼ N. W. ¼ sec. 3, T. 2 S., R. 1 E., will not be permitted. Including Finley's 40 acres, the quantity of the land under consideration, which for the reasons stated do not inure to the railroad grant, is 155.47 acres, leaving as proper for selection 4,517.04 acres, as follows:

		Acres.
The N. ½	sec. 1, T. 2 S., R. 1 E.	306.82
Lot 2 of N.W. ¼ & S.W. ¼ N.W. ¼	" 3, " " "	114.77
S. E. ¼	" " " " "	160.00
Lots 1 and 2 of N. E. ¼	" 5, " " "	157.13
S. E. ¼	" 5, " " "	160.00
E. ½ S. W. ¼	" 5, " " "	80.00
S. E. ¼ S. E. ¼	" 9, " " "	29.48
N. W. ¼	" 11, " " "	160.00
S. E. ¼	" " " " "	160.00
S. W. ¼	" " " " "	160.00
E. ½ sec. 13,	T. 2 S., R. 1 E.	314.58
W. ½ " 13,	" " "	318.18
N. E. ¼ " 15,	" " "	160.00
W. ½ " "	" " "	320
E. ½ " 21,	" " "	305.60
Lots 1 & 2 & E. ½ N. E. ¼ sec. 33,	" " "	155.04
All sec. 35, T. 2 S., R. 1 E.		640.00
337 Lots 1 & 2 & W. ½ N. W. ¼ sec. 1, T. 3. S., R. 1 E.		161.73
S. E. ¼ of S. W. ¼ & lot 14, sec. 17, T. 3 S., R. 3 E.		77.26
S. W. ¼ S. E. ¼	" 17, " " "	40.00
S. E. ¼ N. E. ¼	" 19, " " "	40.00
N.E. ¼ N.E. ¼, lot 4, & S.W. ¼ N.E. ¼	sec. 19, T. 3 S., R. 3 E.	110.31
Part of lot 1, N. W. ¼	" " " " "	38.95
Lots 5 & 7, N. W. ¼	" " " " "	27.18
N. W. ¼	" 21, " " "	160.00
S. W. ¼	" 21, " " "	160.00
Total		4,517.54 acres.

You will transmit a copy of this decision to the proper State authorities, accompanied by request for the relinquishment of all claims to the lands included in the above list, calling attention to the fact of your having already asked relinquishment of a portion of them under my instructions of 24th ultimo. You will also ask relinquishment of S. E. ¼ N. W. ¼ sec. 3, T. 2 S., R. 1 E., patented to Harrison Finley July 10, 1867, and erroneously approved to the State September 8, 1870.

This tract should be reconveyed to clear Finley's title, his rights being paramount to either those of the State or railroad company. Advise all parties in interest of this action and allow the usual sixty days for appeal, reporting promptly at expiration of that time.

Respectfully,

J. A. WILLIAMSON,
Commissioner.

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

338 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } 3106.

COMPLAINANT'S EXHIBIT L. S. C. H., Examiner.

U. S. LAND OFFICE,
SAN FRANCISCO, CAL., *May 29th*, 1878.

Hon. J. A. Williamson, Com'r Gen'l Land Office.

SIR: On the 9 March last, "F," your office decided in favor of the C. P. R R. Co., suc'r, etc., to W. P. R. R. Co., in the matter of the application of said Co. to obtain a patent to certain odd-numbered sections in T. 2 S., R. 1 E., M. D. M., now listed to the State of California.

On 25 inst. the State filed an application for a rehearing in said matter, and the same is forwarded herewith.

Very respectfully, WM. R. WHEATON, *Register.*

I hereby certify the foregoing to be a full, true, and correct copy of the original now on file in this office.

A. C. BRADFORD, *Register.*

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "M." S. C. H., Examiner.

U. S. LAND OFFICE,
SAN FRANCISCO, CAL., *May* 29, 1878.

Hon. J. A. Williamson, Com'r Gen'l Land Office.

SIR: I forward herewith appeal (filed on 25th inst.) by State of California from your decision of 9th March last, "F," in the matter of the application of the C. P. R. R. Co., suc'r, etc., to W. P.
339 R. R. Co., to select certain land in T. 2 S., R. 1 E., M. D. M.

The State authorities request that action on this appeal be delayed until their application for a rehearing (which I forward this day) is disposed of.

Very respectfully, WM. R. WHEATON, *Register.*

I hereby certify the foregoing to be a full, true, and correct copy of the original now on file in this office.

A. C. BRADFORD, *Register.*

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } 3106.

COMPLAINANT'S EXHIBIT "N." S. C. H., Examiner.

U. S. LAND OFFICE,
SAN FRANCISCO, CAL., *March* 18, 1879.

Hon. J. A. Williamson, Com'r Gen'l Land Office.

SIR: In reply to your letter of 1st inst. ("F"), in case of W. P. R. R. Co. *vs.* State of California (involving lands in 2 & 3 S., 1 & 3 east), we have now to report that in accordance with your instructions of March 9, 1878 ("F"), we did, on the 26 March, 1878, furnish the State sur. gen'l a true copy of said letter, and did, at the same time, make a demand on the State of California (through her surveyor general) to surrender her title and listing of said lands named in your said letter of (Mar. 9, 1878) within 60 days from the date of said notice, March 26th, 1878, but up to this date she has failed to surrender her said title to said land. We would state, however,
340 that she filed an appeal from your said decision of Mar. 9, 1878, and that the case is now before the Hon. Sec'y of the Int. (See your letter, Dec. 30, 1878, "F.")

Very respectfully, CHAS. H. CHAMBERLAIN.

I hereby certify the foregoing to be a full, true, and correct copy of the original now on file in this office.

A. C. BRADFORD, *Register.*

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "O." S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of a letter addressed to the register and receiver at San Francisco, California, October 18, 1878, is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] N. C. McFARLAND,
Commissioner of General Land Office.

341 *Denial of Application on Behalf of State for Hearing.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 18, 1878.

Register and receiver, San Francisco, California.

GENTLEMEN: I have considered the application of the State of California, transmitted with your letter of May 29th ult., for a rehearing in the case of The Central Pacific Railroad Co. (successor to the Western Pacific Railroad Co.) against The State of California, involving certain lands in townships 2 and 3 south, ranges 1 and 3 east, M. D. M. As the ground upon which this application is based is that of an error in this office in holding the "Lewis" survey to represent the exterior boundaries of the Rancho "Los Pocitas," and as this question has already been passed upon by the Department after full investigation and consideration, I do not feel warranted in directing a rehearing unless authorized so to do by the Secretary of the Interior. I therefore decline to disturb my decision of 9th March last.

On the same day you transmitted the application for a rehearing you also transmitted an appeal from my decision of March 9, to be considered as filed in case the application for rehearing was denied.

Such application having been denied, the State will be allowed thirty days from receipt of notice of this action within which to file argument on appeal from my original decision. Advis- the parties in interest and report promptly.

Respectfully, J. A. WILLIAMSON,
Commissioner.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

342 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "P." S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of Department decision of June 26, 1879, in the case of The State of California *vs.* The Central Pacific Railroad Company, successor to the Western Pacific R. R. Co., is a true and literal exemplification of the original decision on file in this office.

In testimony whereof I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] N. C. McFARLAND,
Commission- of General Land Office.

Opinion of Hon. C. Schurz as to Rights of R. R. Co. and State.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *June* 26, 1879.

SIR: I have considered the case of The State of California *vs.* The Central Pacific Railroad Company, successor by consolidation of the Western Pacific Railroad Company, involving the right to certain lands in townships 2 S., range 1 E., 3 S., 1 E., & 3 S., 3 E., San Francisco land district, California, on appeal from your decision of March 9, 1878. The lands in dispute are within the ten-mile limits of the grant to the Central Pacific Railroad Company, and the odd-numbered sections were withdrawn for the benefit of said company on January 30, 1865, and were selected by it on May 12, 1874. The State claims said lands by virtue of certain indemnity school selections made and certified subsequent to the withdrawal of the
343 lands for railroad purposes. Part of said odd sections of land are within the Lewis survey of the Rancho Los Pocitas, which marked the exterior boundaries of said grant prior to the approval of final survey thereof, June 6, 1871, and part of them are outside of the same. You decided as follows: First, that the odd sections of land within the Lewis survey of the Rancho Los Pocitas, being reserved for the satisfaction of said grant at the date of the withdrawal for railroad purposes, were excepted from the railroad grant; second, that the railroad company had a superior right to the odd sections of land outside of the Lewis survey of said rancho and within its granted limits. The appeal of the State is based upon the ground that the Lewis survey of the Rancho Los Pocitas did not correctly represent the exterior boundaries of said grant, which boundaries, it is contended, rightfully included the lands now claimed by the railroad company and operated to except them from the railroad grant under the decision of the Supreme Court in the case of Newhall *vs.* Sanger (2 Otto, 761). In the case of Arthur St. Clair *vs.* The Western Pacific Railroad Company, decided by your predecessor, Mr. Commissioner Drummond, on May 3, 1873, this question was elaborately discussed, and *and* after full examination it was held that *that* the Lewis survey was a correct delineation of the exterior boundaries of the Los Pocitas grant, and this decision was affirmed by my predecessor, Hon. C. Delano, on November 25, 1873. The question was again raised in the argument of counsel in The State of California *vs.* Townsend *et al.*, and by my decision of January 15, 1878, the former ruling of
344 the Department was sustained. (Copp's Land Owner for March, 1878, p. 189.) After careful examination of the argument of counsel for the State upon this question, in connection with the former decisions of your office and this Depart-

ment, no new facts having been disclosed by the affidavits filed, I adhere to the conclusion that the Lewis survey was a correct delineation of the exterior boundaries of said rancho, and decline to modify former rulings on this point. In the case of The State of California *vs.* Townsend *et al.* it was held that the railroad company had a superior right to the odd sections of land outside of the Lewis survey of the Los Pocitas rancho, but the question of issuing patents to the company for lands which had been certified to the State under the school grant was not presented or considered, and you were directed to demand a relinquishment from the State of those tracts which had been erroneously certified to her and to which the company had the superior right.

The State has failed or refused to relinquish said lands, and the question arises whether, under the circumstances, the lands can be patented to the company. Upon this question I am of opinion that while the company has the superior right to said lands, that the certification of the same to the State, being the final act of the executive department, invested her with the legal title to them as fully as though they had passed by patent, and that this Department has no jurisdiction nor control over them. As the matter stands the company has a superior equity and the State has the legal title, and the question is one which addresses itself to
345 the courts, which alone have jurisdiction over the matter.

I am of the opinion that you have no authority to issue patents for tracts which have been certified to the State, and your decision upon this point is modified accordingly. Upon the other questions presented your decision is affirmed, and the papers transmitted with your letter of December 30, 1878, are herewith returned.

Very respectfully, C. SCHURZ, *Secretary.*

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S. *v.* CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "Q." S. C. H., Examiner.

Letter of Hon. J. A. Williamson, Com'r.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan'y* 24, 1878.

Register and receiver, San Francisco, California.

GENTLEMEN: You are hereby advised that under date of 15th inst. the Hon. C. Schurz, Secretary of the Interior, considered the case of The State of California *vs.* M. D. Townsend *et al.* and the Western Pacific Railroad Company, involving the right to certain lands in township 3 south, range 3 east, M. D. M., — qualified the de-

cision of this office, dated Nov. 1st, 1875. In pursuance thereof I have this day canceled the filings of the following pre-emption claimants for said land, to wit:

D. S. No. 7678, July 10, 1871, by Timothy Crawley, for the
346 N. E. ¼ sec. 19, t'p 3 S., R. 3 east.

No. 5618, June 14, 1869, by H. C. Pursell, for the N. E. ¼ sec. 20, 3 S., 3 east; No. 6322, Mar. 11, 1870, by Jno. Regan, for the N. W. ¼ sec. 19, 3 S., R. 3 east; No. 6207, Feb'y 7, 1870, amended July 10, 1871, by G. W. French, for the N. E. ¼ sec. 20, 3 S., 3 E; No. 7705, July 17, 1871, by Edwin Taylor, for the N. W. ¼ sec. 21, 3 S., 3 E.; No. 5619, June 14, 1869, amended July 3d, 1871, D. S. 7618, by Simon Foscalina, for the S. E. ¼ sec. 20, 3 S., 3 E.; No. 7675, July 10, 1871, by Annie Little, for the S. W. ¼ sec. 20, 3 S., 3 E.; No. 7859, Sept. 25, 1871, by R. D. Rankin, for the N. W. ¼ sec. 20, 3 S., 3 E.; No. 5619, June 14, 1869, by Philip Heernal, for the N. W. ¼ sec. 20, 3 S., 3 E.; No. 6329, Mar. 11, 1870, amended July 19, 1871, D. S. No. 7717, by P. H. Armstrong, for the S. W. ¼ sec. 17, 3 S., 3 E.

No. 6321, Mar. 11th, 1870, amended August 11th, 1871, D. S. 7757, by J. W. Hampton, for the S. ½ of S. E. ¼ sec. 17, 3 S., 3 E.; No. 5633, June 16, 1869, amended July 10, 1871, D. S. No. 7677, by D. W. Smith, for the S. W. ¼ sec. 18, 3 S., 3 E.; No. 5616, June 14, 1869, amended July 5, 1871, D. S. 7649, by Joseph Barron, for the S. E. ¼ sec. 18, 3 S., 3 E., and 6323, Mar. 11, 1870, by Francisco Foscalina, for the N. W. ¼ sec. 29, 3 S., 3 east.

You will call upon the State of California to relinquish the following-described tracts, viz: S. E. ¼ of S. W. ¼, frac'l S. W. ¼ of S. W. ¼, and S. W. ¼ of S. E. ¼ sec. 17, S. E. ¼ of N. E. ¼ sec. 19, and W. ½ of sec. 21, 3 S., 3 east, approved to the State November 15, 1871; lots 4, 5, and 7, frac'l S. E. ¼ of N. W. ¼ sec. 19, 3 S., 3 east, approved to the State Mar. 24, 1873. The hon. Secretary awards the even
347 sections of the lands in dispute, outside of the Lewis survey, to the State, the odd sections of the same to the railroad company, and rejects the claim of the latter to lands within the claimed limits of the Los Pocitas rancho. This action closes said case.

Notify all parties in interest of this decision, a copy of which is herewith enclosed.

Respectfully, J. A. WILLIAMSON,
Commissioner.

Opinion of Hon. C. Schurz as to Rights of R. R. Co. & State — Cal.

Department of the Interior, office of the Secretary.

WASHINGTON, D. C., *January* 15, 1878.

SIR: I have considered the case of The State of California *vs.* M. D. Townsend *et al.*, involving the right to certain lands in township 3 south, range 3 east, Mount Diablo meridian, San Francisco, California, on appeal from your decision of November 1st, 1875. The claimants to the lands involved in this case are, first, the State of California, claiming by virtue of certain invalid indemnity school

selections, which it is alleged were confirmed by the act of Congress approved July 23, 1866, entitled "An act to quiet land titles in California;" second, certain persons claiming to be *bona fide* settlers under the pre-emption laws; third, the Western Pacific Railroad Company, claiming the odd sections by virtue of the grant to aid in the construction of said road. The selections made by
348 the State are as follows: No. 156, May 16, 1864, for the S. ½ of S. W. ¼ and S. W. ¼ of S. E. ¼ — 17 and N. W. ½ sec. 20 and S. E. ¼ of N. E. ¼ sec. 19, t'p 3 S., range 3 E.; No. 111, June 25th, 1863, for S. W. ¼ and W. ½ of S. E. ¼ and S. E. ¼ of S. E. ¼ section 18, t'p 3 S., R. 3 east; No. 110, June 25th, 1863, for N. W. ¼ and W. ½ of N. E. ¼ and N. E. ¼ of N. E. ¼ section 19, t'p 3 S., range 3 east; No. 73, May 22nd, 1863, for the N. E. ¼ section 20 and N. W. ¼ section 21, t'p 3 S., range 3 east; No. 72, May 22d, 1863, for S. E. ¼ section 20 and S. W. ¼ section 21, t'p 3 S., range 3 E. The S. ½ of S. W. ¼, S. W. ¼ of S. E. ¼, section 17; S. E. ¼ of N. E. ¼ section 19, N. W. ¼ and E. ½ section 20, and W. ½ section 21, t'p 3 S., range 3 E., were approved to the State November 15th, 1871, per list No. 23.

The N. W. ¼, W. ½ of N. E. ¼, and N. E. ¼ of N. E. ¼ section 19, t'p 3 S., range 3 E., were approved to the State March 24, 1873, per list 25.

The S. W. ¼, W. ½ of S. E. ¼, and S. E. ¼ of S. E. ¼ sec. 18 were approved to the State March 24th, 1873, per list 25.

The Western Pacific Railroad Company claims the odd-numbered sections in this township in part satisfaction of its grant of July 1st, 1862, and subsequent amendatory acts thereto. Said lands were withdrawn for railroad purposes January 30th, 1865, and the road definitely located opposite thereto between March 28th and April 15, 1868. M. D. Townsend filed D. S. 6392 March 3, 1870, for the S. ½ of S. E. ¼ section 18 and N. ½ of N. E. ¼ section 19, t'p 3 S., range 3 E., alleging settlement July 30th, 1860, and relinquished his claim December 1, 1871. Timothy Crowley filed D. S. 7678 July 10th, 1871, alleging settlement February 1st, 1871, claiming the N. E. ¼ section 19, t'p 3 S., range 3 E. The testimony shows
349 that he actually settled on said tract in February, 1871. H. C. Pursell filed D. S. 5618 June 14th, 1869, alleging settlement June 10th, 1869, claiming the N. E. ¼ section 20, t'p 3 south, range 3 east. There is no testimony to show when this claimant settled. John Reagan filed D. S. 6322 March 11th, 1870, alleging settlement September 6th, 1861, and amended the same July 3rd, 1871, D. S. 7617, alleging same date of settlement, claiming the N. W. ¼ section 19, t'p 3 south, range 3 east. He actually settled on said tract September 16th, 1867. G. W. French filed D. S. 6207 February 7th, 1870, alleging settlement December 17th, 1869, and amended the same July 10th, 1871, alleging the same date of settlement, claiming the N. E. ¼ section 20, t'p 3 south, range 3 east. He actually settled on said tract November 17th, 1869. Edwin Taylor filed D. S. 7705, July 17, 1871, alleging settlement July 10th, 1871, claiming the N. W. ¼ section 21, t'p 3 south, range 3 east. Actually settled July 10th, 1871.

Simon Foscalina filed D. S. 5617 June 14th, 1869, alleging settle-

ment September, 1867, and amended the same July 3rd, 1871, D. S. 7618, alleging same date of settlement, and claiming the S. E. ¼ section 20, t'p 3 south, range 3 east. Actually settled September 12th, 1867. Annie Little filed D. S. 7675 July 10th, 1871, alleging settlement March 19th, 1871, and claiming the S. W. ¼ section 20, t'p 3 S., range 3 E. She actually settled on said tract April 10th, 1871. R. D. Rankin filed D. S. 7859 September 25th, 1871, alleging settlement September 23rd, 1871, and claiming the N. W. ¼ section 20, t'p 3 south, range 3 east. He actually settled on said tract September 23rd, 1871.

350 Philip Heenal filed D. S. 5619 June 14th, 1869, alleging settlement June 10th, 1869, and claiming the N. W. ¼ section 20, t'p 3 south, range 3 east. There is no testimony to show when this claimant settled. P. H. Armstrong filed D. S. 6329 March 11th, 1870, alleging settlement November 10th, 1864, and amended the same July 19th, 1871, D. S. 7717 alleging same date of settlement, claiming the S. W. ¼ section 17, t'p 3 south, range 3 east. He actually settled on said tract March 29th, 1867. J. W. Hampton filed D. S. 6321 March 11th, 1870, alleging settlement November 25th, 1864; amended the same August 11th, 1871, D. S. 7757, alleging same date of settlement and claiming the S. ½ of S. E. ¼ section 17, t'p 3 south, range 3 east; there is no testimony to show when this claimant settled. D. W. Smith filed D. S. 5633 June 16th, 1869, alleging settlement October, 1866; amended the same July 10th, 1871, D. S. 7677, alleging same date of settlement, claiming the S. W. ¼ section 18, t'p 3 south, range 3 east. He actually settled on said tract September, 1866. Joseph Barron filed D. S. 5616 June 14th, 1869, alleging settlement September 14th, 1867, and amended the same July 5th, 1871, D. S. 7649, claiming the S. E. ¼ section 18, t'p 3 south, range 3 east. He actually settled on said tract September 14th, 1867. Francisco Foscalina filed D. S. 6323 March 11th, 1870, alleging settlement October 20th, 1863, claiming the N. W. ¼ section 29, t'p 3 south, range 3 east. He actually settled on said tract in September, 1868. This claim appears to have been overlooked by your

351 predecessor, as no reference is made to it in his decision.

Part of section- 17, 18, 19 of the lands in contest were within the "Lewis survey" of the Rancho Los Pocitas, which survey marked the exterior boundaries of said rancho up to the 6th day of June, 1871, the date when the final survey was approved by this Department. The attorneys for the State claim that the township plat of 3 south, 3 east, was filed in the local office in December, 1862; but I find nothing to warrant this conclusion unless it be a statement to that effect contained in a letter from your office to B. B. Newman, of San Francisco, California, dated December 26th, 1871, which, I think, conveys an erroneous impression as to the time when the plat of survey was filed. In December, 1865, a plat showing the out-boundaries of the Ranch Los Pocitas was filed in the local office, and this appears to have been the first plat filed of any of these lands as shown by the official records.

A plat was approved by the surveyor general December 24th, 1862, and a copy thereof forwarded to your office, which represents

the whole township as surveyed land, but this plat does not appear to have been filed in the local office. One George H. Thompson testified that he assisted in the survey of the lands in sections 18 and 19 (being the lands selected for Darnaud Overton) in the year 1863. The State, however, seems to have adopted the survey made by the surveyor general in 1862 as her survey
352 in making these selections. On June 4th, 1869, a plat showing the lands in contest to be surveyed was filed in the local office, but it was suspended by the surveyor general June 29th, 1869, restored January 29th, 1870, and suspended by letter from your office dated June 30th, 1870, received at the local office July 11th, 1870; restored by letter from your office dated June 14th, 1871, received at the local office June 23d, 1871. On July 1st, 1871, the surveyor general filed a plat in the local office showing the township to be surveyed land except a part of section 6. The plat filed June 4th, 1869, afterwards suspended, but finally restored on June 23d, 1871, I think must be taken as the official survey of the township, and the selections of the State therefore must be treated as having been made on unsurveyed lands. Lands are not surveyed until the survey is approved and becomes a record in the district land office. Barnard's Heirs *vs.* Ashley's Heirs, 18 Howard, p. 43. As a matter of fact, however, these lands had been surveyed in the field by the United States surveyor general and the subdivisions distinctly marked off, and a survey by the State was unnecessary, and her adoption of the lines of the Government survey in making these selections was equivalent under the circumstances to an original survey by her within the remedial provisions of the 3rd section of the act of July 23rd, 1866. On November 29th, 1871, the claimants from the State by purchase made proof of their purchase before the local officers. This proof consists in each case of an applica-
353 tion for purchase and location; an affidavit for location; an acceptance of the same by the State locating agent; a certificate of location by the same officer; an approval of the location by the surveyor general and a certificate of purchase issued by the register of the State land office. I am of opinion that this proof is sufficient. On October 10th, 1871, Messrs. Britton & Gray, attorneys for the State, filed similar proofs in your office covering the S. ½ of S. W. ¼, S. W. ¼ of S. E. ¼, section 17; S. E. ¼ of N. E. ¼ section 19, N. W. ¼ and E. ½ section 20, and W. ½ section 21, T. 3 south, range 3 east; and these lands were inadvertently listed on said proof November 15th, 1871, while a contest therefor was pending.

I shall first consider the conflicting claims to the lands inside of the Lewis survey of the Los Pocitas rancho. In the case of Newhall *vs.* Sanger, 2 Otto, p. 761, the Supreme Court of the United States held that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road did not inure to the grant. Under this decision it is clear that the claim of the railroad company to lands within the claimed limits of the Los Pocitas rancho must be rejected. The State selections inside of the Lewis survey of the Ranch Los Pocitas conflict with the

pre-emption claims of Smith, Reegan, Barron, Armstrong, and Crowley, neither of whom settled until after the passage of the act of July 23d, 1866. The third section of this confirmatory act allows
354 the holder of the State title the same time to present and prove up his claim after the filing of the township plat as is allowed pre-emptors on unsurveyed lands, and the Supreme Court of the United States held, in the case of Huff *vs.* Doyle *et al.*, 3 Otto, 558, that lands which were at the date of selection within the claimed limits of a valid Mexican grant, but rejected therefrom by the final survey thereof, were confirmed to the State by the act of July 23rd, 1866. As the holders of the State title proved up their purchase within the time prescribed by law and as the land was at that time excluded from the confirmed limits of the Los Pocitas grant, I am of opinion that the right of said claimants related back to the date on which said selections were made to the exclusion of pre-emption claims initiated subsequent to July 23d, 1866, and the lands within the Lewis survey of the Los Pocitas rancho are therefore awarded to the State.

I will now consider the conflicting claims to the lands outside of the Lewis survey of the Los Pocitas rancho, and to that end I shall first dispose of the conflicting claims of the State and the railroad company. The records of your office show that a map designating the route of the Western Pacific railroad was filed in your office December 8th, 1864; that the notice of withdrawal was received at the local office January 30th, 1865, and the road definitely located opposite the lands in contest between March 28th and April 15th, 1868. It is therefore of primary importance to determine
355 the exact time when the grant took effect upon the odd-numbered sections of the land in dispute. In the case of Newhall *vs.* Sanger, before cited, the court, in passing upon the grant, use the following language: The act of July 1st, 1862 (12 Stat., 492), grants to certain railroad companies, of which the Western Pacific, by subsequent legislation, became one, every alternate section of public land designated by odd numbers within ten miles of each side of their respective roads not sold, reserved, or otherwise disposed of by the United States and to which a homestead or pre-emption claim may not have attached at the time the line of the road is definitely fixed.

It requires that within a prescribed time a map designating the general route of each road shall be filed in the Department of the Interior, and that the Secretary thereof shall then cause the lands within a certain distance from such route to be withdrawn from pre-emption, private entry, and sale. The precise date when the Western Pacific Company filed its map is not stated in the record, but we infer that it was between the first day of December term, 1864, of this court and the thirteenth of February, 1865. At all events, the withdrawal for this road was made on the 31st of January, 1865. * * * There can be no doubt that by the withdrawal the grant took effect upon such odd-numbered sections of public lands within the specified limits as were not excluded from it- operation. The map showing the general route of said road was filed (as before stated) on Decem-

ber, 8, 1864, and the court's inference was therefore correct, and the ruling of the court that the grant took effect by the withdrawal of January 30th, 1865, is final and conclusive upon that
356 point.

These State selections, being of unsurveyed lands, were void at the time they were made and at the time the grant took effect. Towland *vs.* Mendall, 38 Cal., 33; Smith *vs.* Athern, 34 Cal., 512; Hastings *vs.* Derlin, 40 Cal., 363; and the question now to be determined by me is whether the act of July 23rd, 1866, confirmed to the State lands which had previously inured to the railroad grant in the absence of an express provision in said act excepting this class of lands from its operation.

In the case of Goodyear *vs.* Cary, 4th Blatch. Circuit Court Reports, 271, the court say: "It is not to be presumed that a grantor intends to grant more than he has a right to grant." In the case of Wilcox *vs.* Jackson, 13 Peters, 498, the Supreme Court of the United States say: "But we go further and say that whensoever a tract of land shall have once been legally appropriated for any purpose from that moment the land thus appropriated becomes severed from the mass of public land; and no subsequent law or proclamation or sale would be construed to embrace it or to operate upon it, although no reservation were made of it."

This doctrine is quoted by the Supreme Court and fully reaffirmed in the case of The Leavenworth, Lawrence and Galveston R. R. Company *vs.* The United States, 2nd Otto, 733.

In the Sioux half-breed reservation case, 11th Opinions, p. 59, Attorney General Bates held that "The Government, like an individual, has no power to withdraw or annul its grant of land. The first lawful grant must stand, and the second cannot operate as a conveyance for the reason that the grantor when he made it had no estate to convey."

357 This doctrine was also maintained by Attorney General Black in the Arkansas swamp-land case, 9 Opinions, 253. In the Leavenworth, Lawrence and Galveston R. R. case, before cited, the Supreme Court, in construing the law with reference to reservations of lands, say: "Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose unless there be an express declaration to that effect. A special exception of it was not necessary, because the policy which dictated them confined them to land which Congress could rightfully bestow without disturbing existing relations and producing vexatious conflicts."

The citation of further authorities, in my opinion, is unnecessary, as I find an unbroken and harmonious line of decisions to the effect that when lands are once legally appropriated under a grant subsequent legislation cannot operate as a conveyance of them for another purpose. At the date of the approval of the act of July 23d, 1866, the odd sections of land outside the Lewis survey of the Los Pocitas rancho had inured to the railroad grant, and it was therefore impossible for Congress to confirm them to purchasers from the State,

because the Government had ceased to exercise control over them and had no interest which it could then bestow.

Giving the State the full benefit of the interpretation which the Supreme Court say is applicable to confirmatory statutes (Ryan *vs.* Carter, 3 Otto, 78), the act of July 23d, 1866, was equivalent only to to a grant *de novo;* and the odd sections of land being then lawfully appropriated under the railroad grant the subsequent grant
358 could not embrace them, although no exception was made of them. Any other construction would destroy vested rights, produce vexatious conflicts, and, in effect, declare a forfeiture of the railroad grant to these lands.

None of the pre-emption claimants settled before the withdrawal of the odd sections for railroad purposes or the approval of the act of July 23rd, 1866, and their claims must therefore be rejected. The even sections of land in dispute outside of the Lewis survey are awarded to the State, and the odd sections to the railroad company, and you are directed to call upon the State to relinquish all claim to the lands awarded to the road.

The papers transmitted with your letter of October 31st, 1876, are herewith returned.

Very respectfully, etc., C. SCHURZ, *Secretary.*

The Commissioner General Land Office.

Endorsed: Gen'l Land Office, Jan'y 24, 1878. State of Cal. *vs.* M. D. Townsend *et al.* Filed Feb'y 18, 1878. Ans. Mar. 18, '79. Crane, Newman, Carter, and Harding notified in writing Mar. 20, 1878. State surveyor gen'l notified to surrender title on or before Apr. 27, '78.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
SAN FRANCISCO, CAL., *April* 26, 1886.

I certify that the foregoing is a full, true, and correct copy of the letter of the Hon. Com'r of the General Land Office of Jan'y
359 24th, 1878, and of the enclosure accompanying the same as they appear of record in this office.

WM. R. WHEATON, *Register.*

(Endorsed:) Filed July 26th, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S.
v. } No. 3106.
CURTNER.

COMPLAINANT'S EXHIBIT "R." S. C. H., Examiner.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Nov.* 8, 1886.

Pursuant to section 882 of the Revised Statutes I hereby certify

that the annexed paper is a copy of the original of record in this Department.

In testimony whereof I have hereunto subscribed my name
[L. S.] and caused the seal of the Department of the Interior to be affixed the day and year first above written.

H. L. MULDERN,
Acting Secretary of the Interior.

Letter of Hon. H. M. Teller as to Jurisdiction to Issue Patents to R. R. Co.

(Copy.)

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 18, 1882.

The Commissioner of the General Land Office.

SIR: I enclose a copy of the opinion of the acting Attorney General in response to a question propounded by my predecessor. The facts in the case are set forth in the opinion itself. You will notice that the acting Attorney General is of the opinion that the head of this Department has no jurisdiction to issue the patents re-
360 quested by the Central Pacific Railroad Company, inasmuch as the subject-matter has passed beyond the control of the Secretary of the Interior. I concur in the views expressed by the acting Attorney General.

The case in which the opinion of the Attorney General was asked is "The State of California *vs.* The Central Pacific Railroad Company," successor by consolidation to the Western Pacific Railroad Company, involving the right to certain lands in t'p. 2 S., R. 1 E., t'p. 3 S., R. 1 E., and t'p 3 S., R. 3 E., San Francisco land district, California. On June 26, 1879, my predecessor, Mr. Schurz, in this case, which came up on appeal from the decision of your predecessor of March 9, 1878, says:

The State has failed or refused to relinquish said lands, and the question arises whether under the circumstances the lands can be patented to the company. "Upon this question I am of opinion that while the company has the superior right to said lands that the certification of the same to the State, being the final act of the executive department, invested her with the legal title to them as fully as though they had passed by patent, and that this Department has no jurisdiction or control over them. As the matter stands the company has a superior equity and the State has the legal title, and the question is one which addresses itself to the courts, which alone have jurisdiction over the matter."

Agreeing with the view thus expressed and with the opinion
361 of the acting Attorney General, I think it incumbent upon me to direct you to prepare the evidence showing the superior right of the company to the lands in question for the purpose of submitting the same through me to the Attorney General, with a request to file the necessary bills in equity based thereon in the

name of the United States to set aside the patents issued to the State of California for the lands described.

Very respectfully, H. M. TELLER, *Secretary.*

(Endorsed:) Filed July 26th, 1887. L. S. B. Sawyer, clerk.

362 U. S. Circuit Court, Dist. of Cal.

U. S.
vs.
CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "X." S. C. H., Examiner.

Endorsement on plat of Dec. 28th, 1865.

"The odd-numbered sections on this plat are granted to the Western Pacific R. R. Co. See letter of instructions dated Dec. 23, 1864."

UNITED STATES LAND OFFICE AT
SAN FRANCISCO, CAL., *Feb'y 17th, A. D.* 1887.

I, A. C. Bradford, register of said office, hereby certify that the above in red ink is a full, true, and correct copy of an endorsement written on the face of the township plat of township 3 south of range 3 east, Mt. Diablo meridian, which township plat was filed in this office on the 28th day of December, A. D. 1865, and since has been and now is of record in this office.

A. C. BRADFORD, *Register.*

(Endorsed:) Filed July 26th, 1887. L. S. B. Sawyer, clerk.

Complainant rests.

363 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "B B." S. C. H., Examiner.

Instructions by Surv. Gen. as to Survey of Las Pocitas by Wm. J. Lewis.

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL., *April 5th*, 1854.

SIR: Mess. Hastings, Thomas and Morse, who represent themselves as the attorneys of Robert Livermore, have applied to this office for a survey of "Las Pocitas," a tract of land claimed by the latter. In compliance with their application you are hereby appointed to execute a preliminary survey of said tract. The claim has been confirmed by the board of land commissioners in the following words, to wit: "In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the

said petitioner is valid, and it is therefore decreed that the same be confirmed;" the lands of which confirmation are hereby made of "Los Pocitas" & are bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less; teference for further description to be had to the map marked C and filed in this cause.

Your survey will therefore conform to the above decree.

I herewith enclose a copy of the map, the original of which is on file with the board of commissioners. In tracing out the boundaries you will avail yourself of the best local evidence. You will
364 notify the adjoining claimants in writing of the time you will run any lines in which they may be interested.

If they should agree to any lines that fact must be entered in your notes, as also their names in full, but if any objections should be made you will note the same and return to this office any protests that may be offered for that purpose. You will also run any lines which any contending parties may desire you to run if they are willing to adequately compensate you for such work. In running the exterior lines you will ascertain each cours- and length of each line in chains and links, designating the corners with the letters R. L. and numbering the parts in regular succession. The variation of the needle must be accurately ascertained & the survey
365 made with reference to the merid-an. Your chain must be tested by the standard in this office. Your field book is to be kept in the same manner & furnish all the information required in performing public work. Great care should be taken in all measurements & observations, so as to preclude the necessity of a revision in the field at any time hereafter. You will have to qualify as if performing public work & the evidence thereof returned with your notes. The requisite oath of the assistants may be administered by yourself. The field-notes are to be accompanied by an accurately protracted map on a scale of 40 or 20 chains to the inch, and also by a correct tabling exhibiting the areas north and south to four figures of decimals and by all observation & calculations in detail having reference to the ascertainment of the lines or the area of the tract. You will connect *or* or more points of your survey with one or more points of any line or lines of the general survey of the State, in order to better indicate the precise location of the tract. As this is a preliminary survey for your compensation, of which you have to make arrangements with the claimant, I shall only add that under no circumstances will this office be responsible for any services connected with the execution of these instructions. Enclosed you will find a copy of the instructions for the public surveys of Oregon, applicable also to this State.

Yours respectfully,

(Signed) JOHN C. HAYS,
U. S. Sur. Gen'l, Cal.

To Mr. Wm. J. Lewis, dep. surveyor.
26—1045

I, R. P. Hammond, Jr., U. S. surveyor general for the dis-
366 trict of California, do hereby certify that the foregoing is a full, true, and correct copy of the "Instructions of John C. Hays, U. S. surveyor general for California, to Wm. J. Lewis, deputy surveyor, dated April 5th, 1854, for the survey of Las Pocitas rancho," as the same appear on file and of record in this office.

Witness my hand and official seal this 29th day of December, A. D. 1886.

A. P. HAMMOND, JR.,
U. S. Surveyor General for Cal.

(Endorsed:) Filed July 26th, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "C C." S. C. H., Examiner.

Field-Notes of Lewis Survey.

Field-notes of the survey of the Rancho de las Pocitas.

May 5th, 1854, Juan Bernal, claiming land, in company with Antonio Suñol and Augustin Bernal, adjoining the Rancho de las Pocitas on the west, came to the house of Robert Livermore and he and said Livermore, myself, and others went to an oak tree about $\frac{5}{8}$ths of a mile to the westward of Livermore's house, which said Livermore claimed as a corner. He also pointed out a line running from thence, touching the eastern side of the Arroyo Mocho as the western boundary claimed by him, being the former eastern boundary of the establishment or mission of San José. Juan Bernal stated that he was satisfied with the position of said corner and line. The assistants in the survey, viz., Thomas Brannan and Michael Murry, chainman; Michael Murry, axeman, and Chas. Hoffman,
367 flagman, being previously sworn, the survey was commenced at the oak aforesaid, which was marked R. L. 1. The course and distance from this tree to the United States section stake 13 miles south and 6 miles east of Monte Diablo was found to be S. 82° W. 65 21 chains.

The exact position of the channel of the Arroyo Mocho could not be ascertained at the tree, its course being concealed by a grove of oak trees in its vicinity. An experimental line was therefore run from the tree R. L. 1 in what was presumed to be a direction to touch the most eastern bend of the arroyo in a course—

S. 55° 50′ E. true magnetic variation, 16°. 1.00, X road from San José to Stockton; 29.64, large oak, Livermore's house N. 53¼ E.; 65.00, summit of Cuevas Peak, N. 37¾ E.; 240.00, stake. Stopt May 5th; resumed May 6. 256.50, live oak, summit knoll 30 ft. high, N. 44 E.; 278.00,

same live oak, N. 18½ E.; 311.00, cluster of live oaks 3 chs. to left; 320.00, stake 4 miles. The line from R. L. 1 to this point traverses a plain covered densely with rounded quartz pebbles, destitute of water, and producing little grass or vegetation of any description. From 4-miles stakes N. 59 E. 29 chs. to a spring (constant water); water from spring runs N. 34 W. about 20 chs. & then sinks; from spring N. 62 E. about 40 chs. to summit of knoll 80 ft. high. At 4-mile stake, finding the experimental lines passed too far eastward, I made an offset to an oak (which I marked R. L.) on the east bank of the Arroyo Mocho; width of arroyo, 0.75 chs.

S. 42° 39′ W. 22.44 chs.

Boundary on the side of the establishment of San Jose.

The calculated course and dist. back to R. L. 1 is N. 51° 50′ W. 317.45 chs.; course of arroyo down, N. 64 W. A compass line was run back on this course to the edge of the timber (about 30 chs.) and the trees adjacent marked. The reverse course was then continued forward from the tree R. L. at the Arroyo Mocho towards the base of the Buenos Ayres range.

368

S. 51° 50′ E.

19, Arroyo Mocho, 9 chs. to right.
30, " 5 chs. "
44, on eas- bank of Arroyo Mocho; 54, marked white oak, high bank of arroyo 1 ch. to right; thence across low flat 5 chs. to Arroyo Mocho; thence 3 chs. to foot of low hills; (93) foot of hill runs N. 17 W. 13 chs., when hill subsides to level of plain; (95) at top of gently sloping table, 25 feet above lower plain; (107) at base of foot-hills of the Buenos Ayres ridge placed stake, which I marked R. L. 2 (subsequently changed to R. L. 5); from this stake the bearing trees are: white oak 27 inches in diameter bears S. 11 E. 0.28 chs.; another white oak, 24 in. diam., bears N. 21 E. 0.23 chs.

Boundary adjoining ranch of Don Jose Dolores Pacheco.

Monday, May 8, 1854, Augustin Alviso, the present owner of the rancho granted to Jose Dolores Pacheco, having been previously notified by me in writing, appeared and pointed out a line running from the oak marked R. L. 1 towards a chamizal on the Golgone's range in a course N. 2° 50′ W. as the boundary between his land and that of Robert Livermore, in which the latter concurred.

Began at oak R. L. 1 to run this line:

N. 2° 50′ W.

24.30, X Arroyo de las Positas, width 0.20.
29.00, springs & willows, near cr., 4 chs. to R.

369 32.00, north side valley, at base of ascent, course along base of hills S. 68 E.; (54) top of spur; (58) bottom of do.; (60) top of spur; (62) bottom of do. in opening between hills.

N. 2- 50′ W. continued. 77, at summit of knoll; (94) foot of hill in valley 4 chs. wide; 120, foot of hills rise to right & forward; 127, summit of knoll; 130, foot of same; 147, at foot of high ridge (slope 15°); 156, summit of ridge; 162, X head of dry run foot of ridge; 174, top of flat spur; 185, on steep side hill, slope 30°; 190, spring, 5 chs. to right; 195, at base of steep ascent; 203.50, summit of ridge, probably 500 ft. above general level of Livermore Valley; 218, spring (constant water); 224.20, X run at right angles at bottom of deep ravine.

N. 2° 50′ W. continued. Tuesday, May 9, 1854. 253.50, summit of high ridge, highest point of ridge 10 chs. left; 278, base of ridge in valley nearly level with the general plain, course of base of ridge S. 55 E.; 283.50, X small creek; 284.50, across do.; 286.25, cross again same or at base of ridge; 292.50, base of steep ascent; 303, summit of knoll, eastern foot of ridge last past bears S. 34 E., summit Cuevas Knob N. 77¼ E.; 308.50, bottom of ridge last past & foot of next ridge; 326.50, summit of spur knoll, S. 63½ E.; 10.00, Mr. Livermore's tenant-house on east side of Arroyo Cayetano, S. 72¼ E.

Western boundary adjoining rancho of Don J. D. Pacheco.

N. 2° 50′ W. continued. 342, foot of ridge in small valley.

350, foot of Cuevas Hills at northwest corner of rancho; at this point placed a large stake, which I marked R. L. 2. There were no trees to use for bearing trees in this vicinity.

370 From R. L. 2 the northern boundary of the rancho was run on a course S. 76 E., following as near as was practicable the base of the Cuevas Hill, but in consequence of the projecting of the spurs & the indentations of the valley the line sometimes passed over the points of the spurs & sometimes crossed narrow valleys connected with general plain.

Northern boundary along the base of the Cuevas Hills.

S. 76 E. 11.50, X Arroyo de dos Alamos (N. 8 W., up).

23.22, top of flat spur, mag. var. 15° 50, Mr. Livermore's ten.-house east of the Arroyo Cayetano, S. 56¼ east.

33, X dry run; 40, general level of valley & foot of hills 5 chs. to right rises 4° to left for 20 chs.

55.70, Cuevas Knob, N. 80° 33 E., tree (A) on east point of ridge beyond Arroyo de dos Alamos (S. 9 15 E).

70, foot of low hills and general level of plain on the west side of the Cayetano Valley.

82.20, X Arroyo Cayetano (up N. 32 W., down S. 22 E., live oak), along both sides of creek as far S. E. as Livermore's tenant-house.

S. 76 E. continued. 90, top of flat spur 30 ft. above plain, foot of steep ascent of high spur from Cuevas Knob, 10 chs. to left.

96, at foot of spur.

100, in plain foot of Cuevas Mts., 15 chs. left.

120, tree (A) at end of S. W. ridge, S. 50 W.; Mr. Livermore's tenant-house on east side of Arroyo Cayetano, S. 45 W.; base of steep ascent of Cuevas hills, 15 chs. to left.

144, base of spur from Cuevas Hills.

149, X small spur.

158, summit of high spur.

163, X dry creek.

371 170, point of high spur from Cuevas Hills, foot of spur at plain 4 chs. to right, foot of spur last crossed S. 33 W. 10 chs.

S. 76 E. continued. 177, foot of spur, top of main spur, 12 chs. to left.

185, top of spur, base 5 chs. to right.

190, base of spur in valley.

196.80, X dry run, up N. 12 W., down S. 12 E.

200, stake (2½ miles). Stopt Tuesday evenings & commenced Wednesday, May 10, '54.

200, summit of Cuevas Knob, N. 54¾ E.; summit isolated knoll (B) in plain, S. 41¾ E.; summit high knoll (C) N. 17½ E., about 20 chs.

209, X small run.

228.60, spring constant water, S. 14½; E. 960, mag. var. 15° 15′ (local attraction); 261.20, mag. var. 15° 50′, knoll C, N. 22 W.

262, summit of knoll; 266.50, bottom of hollow (N. 5 E.), 5 chs. to right; large oyster shells in abundance.

S. 76 E. continued. 272, mag. variation 16°.

272.50, pass 0.25 chs. to left of the right live-oak grove or "encinal."

273, top of spur, 3 chs. to right; lowest ground nearly level with the plain, being a hollow between the spur and A knoll, 10 chs. to R.

280, on undulating ground, rising to the right and in advance; soil, conglomerate rocks, and gravel.

297, knoll 5 chs. to right, mag. var. 15° 45′.

309, at foot of bluff in narrow valley; 313.20, X creek, N. 6 E. & S. 24 E.

S. 76 E. (continued). 332, on side hill at northeastern angle of the plain on Livermore Valley; placed stake R. L. 3. (Note.—On Friday, May 12th, the stake R. L. 3 was moved back 7.25 chs., making the distance from R. L. 2, R.

372 L. 3, 324.75 chs. on the northern line as established.)

From the corner R. L. 3, at the end of 332 chs., ran a line in the course S. 40″ 45 E., intending to follow generally the base of the Buenos Ayres ridge. The hills west of the Cuevas Knob we designate "The Lomas de las Cuevas," and the ridge extending southeastwardly from the cuevas known — the Sierra of Buenos Ayres.

Northeastern boundary along base of Sierra of Buenos Ayres.

Line along the base of the Sierra of Buenos Ayres, beginning at R. L. 3; from R. L. 3 live oak S. 46 E.

S. 40° 45′ E. 500, X run at right angles; 21.33, live oak seen from R. L. 3, N. 19 W.

27, high point of spur, foot of long ridge (C), S. 27¾ W.

49, X Arroyo del Camino a las Cuevas, N. 27½ E.

58.50, X summit of bluff; 63.50, foot of bluff, sloping side hill; 74.33, foot (C) of long ridge, S. 76½ W.; foot (D) more southern point of same ridge, S. 62½ W.

87, X dry gulch; 100, X rocks on side hill; 103, X high bluff.

S. 40° 45′ E. 107.50, in hollow.

110.50, point of spur; summit of knoll, 3 chs. to left; foot, 4 chs. to right; 120, at dry run; 127, top of flat spur.

134, in hollow, foot of steep ascent.

136, top of steep ascent; ground rises gradually ahead.

140, top of flat spur, base 10 chs. to R.

145, X shallow hollow; 154, summit of high knoll.

S. 40° 45′ E. At 168.69 chs. ran north 9.52 chs.; thence S. 42¾ W. 2.21 chs. to U. S. section stake on township line 12 miles east and 11 miles south of Monte Diablo.

165, X road from San José to Stockton; course N. 24½ E. 20 chs. to base of high mountain on Buenos Ayres ridge; thence S. 64 E. base of mt. to northward, N. 24 W.

373 165.50, X creek; runs parallel to Stockton road.

167, stake; quit work Wednesday evening & began Thursday, May 11th, 1854.

171, top of steep ascent; 175, high peak 10 chs. to left.

186, X summit of spur, base 15 chs. to right.

195, foot of spur.

S. 40° 45′ E.

200, northeast corner of small *stake* in narrow valley.

205, at southeast corner of same lake.

220, another small lake 4 chs. to right.

250, top of cross-spur in valley.

280, on side hill, bottom of valley 2 chs. to right.

282.50, X pt. of spur 1 ch. to right of a gap.

291.50, in hollow of valley, ground descended to right to Livermore Valley.

295, bottom of valley 5 chs. to right; 10 chs. to right sharp hill 100 ft. high.

296.50, summit of spur, bottom of valley 5 chs. to right, summit of high peak N. 41¾ E. 40.

308.50, at foot of ascent forward ground; descend in small valley opening through the hill in a course N. 62½ W. to Livermore's plain.

S. 40° 45′ E. 317, top of spur.

320, stake, 4 miles; stopt Thursday & began Friday. At 195 chs. we enter a small valley separated from Livermore's Valley by irregular rolling hills, & continue in it to the 4-mile stake. The general elevation of the valley is about 100 feet above Livermore's Valley.

374 Finding that the continuation of the course S. 40° 45′ E. ran too far into the hills, and offset was made at right angles or S. 49 15 W. 17.50 chs. to a point near the base of the hills. A compass line was run back, on a course N. 38° 25 W., to the northern line of the rancho as surveyed. It intersected the northern line or course S. 76 E. 324 75 chs. from the corner R. L. 2 or 7.25 back of R. L. 3. The stake at R. L. 3 was then brought to the intersection and the line last run chained.

Beginning at R. L. 3—

S. 38° 25′ E. 10, bottom of hill; 12, spring 3 chs. to right valley; up N. 36 E. 15 chs.; then closed by hill.

20.50, top of spur, base 5 chs. to right; 23, in hollow.

26, top of spur, valley 3 chs. to right.

18, bottom of do.

S. 38° 25′ E. 46.50, top of broad spur, valley 4.00 to R.

57, cross Arroyo del Camino a las Cuevas at level of Live Valley.

59.50, recross do.; 60.50, cross 3d time.

65, top of spur, valley 3 chs. to R.

68.50, foot of do., nearly level of valley.

71.50, top of spur, valley 3 chs. to R.

75, foot of do., point of lake 4 chs. to R.

80, lake 3 chs. to right.

S. 38° 25′ E. 83.50, strike left edge of lake.

87.00, leave edge of lake; shore bears to R.

93, shore of lake 4 chs. to right, foot of hills 4 chs. to left at mouth of small runs.

98.50, in range with eastern shore of lake S. 16 W. 3 chs., thence along eastern shore S. 16 W. 15 chs. to southern angle of lake; 105, base of hills to left.

375 120, southern end of hills on north side of valley (D) S. 87½ W.; north point of isolated hills same course

or S. 87½ W.; lone low hill in valley S. 38½ W.; south point of isolated hills S. 58½ W.; 123.50, X dry creek at base of ascent; 130, top of flat spur, valley 6 chs. to R.

S. 38° 25′ E. 133.50, bottom of hollow; 136.50, top of spur, foot 5 chs. to R.

141.50, foot of same; 148, top of spur, slope to right 30° for 3 chs. to foot & level valley.

160, stake, 2 miles, foot of hill 1 ch. to right; some low hill in valley, S. 86 W.; most western point of hill beyond Stockton road bears S. 6 E.

167.50, foot of bluff in valley.

169, X creek from pass of Stockton road.

170.50, X Stockton road 175; stopt; Friday evening, May 12th, & resumed Saturday morning, May 13, 1854.

175, at base of hills; course along base of hills S. 16 W.

S. 38° 25′ E. 188.74, cross township line 26.70 chs. south of U. S. section stake 12 miles east & 11 miles south of Monte Diablo.

194, summit of spur, base 3 chs. to R.

200, stake in small valley, runs N. 48 E. and connects with the valley which the line first run (or on course S. 40° 45′ E.) passes through; found that on this line we had gained 1.79 chs. on the measurement of the former line.

210, top of spur; 215, in hollow; 217.50, X low spur.

221.50, bottom of hollow, N. 85° W. to main valley.

S. 38° 25 E. 228.50, top of spur, falls to left to small valley; rises to right 3 chs., being on left slope of hill between main & small valley.

237.50, summit of round hill, falls in every direction.

376 240.3, mile stake; ground falls to left; small valley 1 ch. to right summit; then falls to Livermore Valley.

S. 38° 25° E. 251.50, bottom of hollow.

continued. 255.22, X township line 1.59 chs. east of ¼-section stake or 41.59 chs. east of township corner; found the stake lying on the ground.

262.50, top of spur, runs west & projects into Livermore Valley.

270, bottom of hollow, spring 8 chs. to R.

273, summit of knoll 4 chs. to R.

280, 3½-mile stake; 283.50, level of upper valley & base of steep ascent ahead; ground falls to right to Livermore's Valley.

293.50, X very high spur, summit 2 chs. to left; at 10 chs. to right deep hollow & hills between this and Livermore's Valley; 308.50, summit of still higher point, overlooking Livermore's Valley, Cuevas Knob N. 16° 10′ W.

320, 4-mile stake, S. 70 W. to end of small hill beyond the hollow.

329.40, X run, spring at head of do. N. 70 E. 10 chs., course of run down S. 48 W.

340, in range with points of spurs of southern hills projecting into Livermore's Valley, course along foot of hills S. 45 W. about 15 chs. to 1st point.

346.75, spring perpetual water 0.50 chs. to right, 3 chs. to right square enclosure, 1 ch. on each side.

354, X summit low spur, base 3 chs. to R.

360.75, X dry creek, deep channel (N. 89½ E.), up about 30 chs. through hill; then bends to left.

365.50, X point of spur, summit 3 chs. to left.

377 375, foot of do. on wet land.

383.50, X small run.

396.50, crossing a narrow valley and trail to Patterson's Pass, to the base of the southern ridge.

400.5, mile stake on west side of valley of Patterson's Pass, foot of hill 2 chs. to left, valley 8 chs. wide.

415, at base of south ridge.

423.50, squatter's house 3 chs. to left, base of south ridge 3 chs. to right, east ridge 8 chs. to left, N. 87 E., 20 chs. to edge of valley, where Patterson's trail leaves it.

464, at base of hill and head of valley.

467.50, placed stake marked R. L. 4 for the eastern corner of the rancho to a lone black oak 10 ins. diameter, marked for bearing tree N. 88 E. 487 chs.

S. 56° 45′ W. continued. Left off at this corner Saturday evening, May 13th, 1854.

Southeastern boundary along the foot-hills of the Sierra of Buenos Ayres.

Monday, May 15th, 1854, I calculated the course of the closing line from stake R. L. 4 to stake R. L. 5, & found it to be to S. 56° 45′ W. Began at R. L. 4 to run this line.

S. 56°. 45′ W. 10, base of spur at gap in hill's summit of high peak A, from which all the hills to the right, east of the Arroyo de Buenos Ayres, are spurs 7 N. 57½ W.

30, X small valley obliquely to foot of bluff on left side and base of main Buenos Ayres ridge valley, 5 chs. wide.

32.50, X spur, base 150 to right; 42.50, base of spur in valley.

46, base of spur ahead; 50, top of do., base 2 chs. to right.

68, base same valley or right, 3 chs. wide.

80, in small valley, grass resembling timothy, line on

right side of valley and base of spur, valley bend to left.

87.50, top of spur, valley 2 chs. wide 4 chs. to left.

378 High point A, N. 47 E.; high point B, N. 46 W. Pass Buenos Ayres (connects with corral hollow) S. 55½ E.

100, at base of hill in Livermore's Valley; course along base of hills on north side of valley up, S. 48 E.; down, N. 86 W.

143, X Arroyo de los Buenos Ayres and strike Robler or oak grove.

196, pass 1 ft. to R. of small oak beyond this and to next arroyo, timber on right; none on left except along arroyo.

206.95, X east line of township 216 chs. north of quarter-sec. stake.

218.70, cross small arroyo, course up S. 68 E., low hills, spurs from the Buenos Ayres ridge; come down to the creek on west side.

240, pass of Buenos Ayres south 80½ E., ground rises to left slope 3°.

250.25, X small arroyo at right angles; scattered oaks on its banks.

301, stake R. L. 5 18 links to right of course; true course from R. L. 4 to R. L. 5, S 56° 47′ W. 301 chs.

General Observations.

This rancho is situated at the western base of the Coast Range in a valley which is nearly enclosed by the mountain and the spurs projecting from it. The Cuevas Knob is a high peak of the range, and the "Lomas de las Cuevas" are the foot-hills of this peak. The Sierra de Buenos Ayres is the name of that part of the range on the east side of the valley or in the vicinity of the head of the Arroya de Buenos Ayres. At this point there is a low gap in the mountain, through which there is generally a strong wind blowing,

379 whence the name is derived. The calls in the grant of the rancho might perhaps authorize the running of the eastern boundary along the summit instead of at the base of the mountain, but no such construction is asked by the claimant (Robert Livermore). On the contrary, he expressed himself entirely satisfied with the boundaries as I surveyed them and as represented in the accompanying map.

The Arroyo de las Pocitas is the only running stream which does not dry up in the summer season. Along the borders of the creek, east of Mr. Livermore's residence, there are about 200 acres of moist land, suitable for cultivation. The rest of the rancho is suitable only for grazing, and yield but an indifferent supply of grass. The adjacent land is also destitute of running water, and offers small inducements to settlers.

It may be proper, before closing these observations, to remark that in the petition to the Mexican authorities which precedes the grant & forms a part of the expediente the land is described as two leagues, a little more or less, in length along the valley and about the same in width across the valley, and bounded on the side of the Cuevas Hills & the Sierra of Buenos Ayres by the margin of the hills. I have no doubt that it was the intention of the Mexican Government to grant the lands thus more particularly described, and that the survey as made fulfills that intentions.

WM. J. LEWIS,
Dep. Surveyor.

380 *Tabling of the Final Survey of Rancho de las Pocitas, Surveyed by —— ——, ——, 188–.*

No.	Courses.	Dist.	N. L.	S. L.	E. D.	W. D.	L. C.	D. C.	N. L.	S. L.	E. D.	Corrected. W. D.	Lat.	Dep.	Mutto.	North area.	South area.
	N. 2° 50′ W.	350.00	349.57	.....	.....	17.30	.....	.....	349.17	.....	.....	17.82	.....	.....	0.50	.....	.....
	S. 76 E.	324.75	.....	78.56	315.10	.....	.....	.....	.....	78.93	314.63	.....	.....	.....	296.81	.....	23,427.2133
	S. 38° 25′ E.	467.50	.....	366.29	290.49	.....	.....	.....	.....	366.82	289.80	.....	.....	.....	901.24	.....	330,592.8568
	S. 56° 47′ W.	301.00	.....	164.89	.....	251.82	.....	.....	.....	165.23	.....	252.27	.....	.....	938.77	.....	155,112.9671
	N. 51° 50′ W.	424.45	262.29	.....	.....	333.71	.....	.....	261.81	.....	.....	334.34	.....	.....	352.16	92,199.0096	.....
		1,867.70	611.86	609.74	605.59	602.83	.....	.....	610.98	610.98	604.43	604.43	.....	.....	.....	.....	509,133.0372
			609.74		602.83												92,199.0096
																	2)416,934.0276
			Error 2.12		Error 2.76										Content- acres		20,846.7
																	4032.000
																	41693
																	6254
																	83
															Content- leagues.....		4.8030

WM. J. LEWIS,
Deputy Surveyor.

381 A list of the names of the individuals employed to assist in running, measuring, or making the lines and curves described in the foregoing field-notes of the initiatory survey of the Rancho de las Pocitas, showing the respective capacities in which they acted.

Thomas Brannan, chainman; Michael Murry, chainman; Michael Murry, Sr., axman; Charles Hoffman, flagman.

We hereby certify that we assisted Wm. J. Lewis, deputy surveyor, in surveying the Rancho de las Pocitas, and that said rancho has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed and the boundary monuments planted according to the instructions furnished by the surveyor general.

THOMAS BRANNAN, *Chainman.*
MICHAEL MURRY, *Chainman.*
MICHAEL MURRY, SR., *Axeman.*
CHARLES HOFFMAN, *Flagman.*

Subscribed and sworn to by the above-named persons before me, at the house of Robert Livermore, this 15th day of May, 1854.

WM. J. LEWIS,
Dept. Surveyor.

I, William J. Lewis, deputy surveyor, do solemnly swear that in pursuance to instructions received from John C. Hays, surveyor general of the United States for the State of California, bearing date April 5th, 1854, and in strict conformity to the laws of the United States, I have faithfully executed the initiatory survey of the Rancho de las Pocitas, and that the foregoing are the true and original field-notes of such survey.

WM. J. LEWIS.

Sworn to and subscribed before me this 31st day of May, 1854.

[SEAL.] WM. A. CORNWALL,
Notary Public.

382 I, Thomas Brannan, having been appointed a chainman in the service of William J. Lewis, deputy surveyor, in California, *to* solemnly swear that in all surveys of public lands or private land claims in which I shall be so employed that I will level the chain in measuring over uneven ground and well and truly plumb the tally pins, whether sticking or dropping the same, and that I will report the true distance to all notable objects and the true lengths of all lines that I may assist in measuring, and will mark correctly and distinctly the letters and numbers of all corners that I may be required to mark; that I will faithfully act as required by said deputy from time to time in planting the corner boundaries, whether the same be *parts* or mounds, either of earth or stone, together with such other services as I shall be called to perform by said deputy in the discharge of his surveying duties to the best of my skill and ability, so help me God.

THOMAS BRANNAN.

Sworn and subscribed before me, at the house of Robert Livermore, county of Alameda, State of California, this 5th day of May, A. D. 1854.

WM. J. LEWIS,
Deputy U. S. Surveyor.

I, Michael Murray, having been appointed as chainman in the service of Wm. J. Lewis, deputy surveyor, in California, do solemnly swear that in all surveys of public lands or private land claims in which I shall be so employed that I will level the chain in measuring over uneven ground and well and truly plumb the tally pins, whether sticking or dropping the same, and that I will report the true distance to all notable objects and the true
383 lengths of all lines that I may assist in measuring, and will mark correctly and distinctly the letters and numbers of all corners that I may be required to mark, and that I will faithfully act as required by said deputy from time to time in planting the corner boundaries, whether the same be posts or mounds, either of earth or stone, together with such other services as I shall be called to perform by said deputy in the discharge of his surveying duties, to the best of my skill and ability, so help me God.

MICHAEL MURRAY.

Sworn & subscribed before me at the house of Robert Livermore, county of Alameda, State of California, this 5th day of May, 1854.

WM. J. LEWIS,
Deputy U. S. Surveyor.

I, Michael Murray, Sen'r, having been appointed an axeman in the service of Wm. J. Lewis, deputy surveyor in California, do solemnly swear that in all surveys of public land or private land claims in which I shall be so employed that I will truly and faithfully mark all bearing trees and trees adjoining the line of survey as directed by said deputy, and that I will otherwise faithfully act as required by said deputy from time to time in planting the corner boundaries, whether the same be posts or mounds of earth or stone, together with such other services as I shall be called to perform by said deputy in the discharge of his surveying duties to the best of my skill and ability, so help me God.

MICHAEL MURRAY.

Sworn and subscribed before me at the house of Robert Livermore, county of Alameda, State of California, this 5th day of May, 1854.

WM. J. LEWIS,
Deputy Surveyor.

384 I, Charles Hoffman, having been appointed a flagman in the service of Wm. J. Lewis, deputy surveyor in California, do solemnly swear that in all surveys of public lands or private land claims in which I shall be so employed that I will hold the flagstaff

vertically, and that I will otherwise faithfully act as required by said deputy from time to time in planting the corner boundaries, whether the same be posts or mounds of earth or stone, together with such other services as I shall be called to perform by said deputy in the discharge of his surveying duties to the best of my skill and ability, so help me God.

CHARLES HOFFMAN.

Sworn and subscribed to before me at the house of Robert Livermore, county of Alameda, State of California, this 5th day of May, 1854.

WM. J. LEWIS,
Deputy Surveyor.

Copy of Notification to Augustin Alviso, Purchaser & Present Owner of the Rancho of Don Jose Dolores Pacheco.

"To Don Augustin Alviso:

You are hereby notified that I am now prepared to survey the ranch of Robert Livermore under the direction of the surveyor general of the U. S. for the State of California. The description of said rancho indicate- the land of Don Jose Dolores Pacheco for one of its boundaries; as I learn that you have become the purchaser of said Pacheco's land, you are hereby requested to attend and point out the line claimed by you on the side of the Rancho de las Pocitas.

Livermore, May 5th, 1854.

Yours very resp.,

WM. J. LEWIS,
Dept. U. S. Surveyor."

385 The foregoing field-notes of a preliminary survey of a tract of land called Las Pocitas, claimed by Robert Livermore, have been examined and approved, the said survey having been executed in conformity with the confirmation of the U. S. board of land commissioners.

In their decree they state the quantity to be two square leagues, a little more or less, but the specific quantity actually found within the boundaries mentioned in the said decree is four square leagues, three thousand four hundred eighty-five acres & $\frac{59}{100}$.

U. S. surveyor general's office, San Francisco, Cal., June 19th, 1854.

JOHN C. HAYS,
U. S. Sur. Gen'l, Cal.

UNITED STATES SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CALIFORNIA.

I hereby certify that the foregoing transcript has been correctly copied from the original field-notes as the same appear of record and on file in this office.

In testimony whereof I have hereunto signed my name officially

and caused the seal of office to be affixed this tenth day of July, 1883.

[L. S.] W. H. BROWN,
U. S. Surveyor General for California.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

386 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "G G." S. C. H., Examiner.

Opinion of Register U. S. Land Office in Arthur St. Clair Case.

UNITED STATES LAND OFFICE,
SAN FRANCISCO, CALIFORNIA, *Nov. 11th*, 1872.

ARTHUR ST. CLAIR
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

The testimony taken in this case by stipulation of counsel as to the rights of the W. P. R. R. Co. is admitted as evidence in every case involving an odd-numbered section within the limits of what the pre-emption claimants offering proof claim to be the exterior boundaries of the Rancho Las Pocitas. This decision is intended to apply to all the cases which, with exceptions noted herein, depend upon the same principles. The cases involved, therefore, in the testimony and this decision are as follows, the same being the only parties offering proof: A. A. Overacker, N. E. ¼ and lots 1, 2, & 3 of section 15, T. 3 S., R. 2 E. Henry Goetzen, N. E. ¼ sec. 13, T. 2 S., R. 1 E.

H. M. Miller, S. E. ¼ sec. 15, T. 2 S., R. 1 E.
John O'Hara, " " " "
Jesse F. Crape, N. E. ¼ sec. 23, T. 2 S., R. 1 E.
D. B. Gordon, N. W. ¼ " " "
Andrew Cornell, S. E. ¼ " " "
Michael Doolan, S. W. ¼ " " "
Wm. J. Murray, N. E. ¼ " 25, " "
Hugh McMurray, S. E. ¼ " " "
Michael Cronin, S. W. ¼ " " "
Lewis McDaniel, N. E. ¼ " 27, " "
Miles Johnson, N. W. ¼ " " "
Washington McDaniel, S. E. ¼ sec. 27, T. 2 S., R. 1 E.
Walter M. Johnson, S. W. ¼ sec. 27, T. 2 S., R. 1 E.
387 Hugh O'Hara, N. E. ¼ section 35, T. 2 S., R. 1 E.
Rasmus Bjorn, N. W. ¼ " " " "
John P. Greely, N. E. ¼ " 13, " R. 2 E.
Robert Smith, S. E. ¼ " " " "
Wm. H. Williams, E. ½ of N. E. ¼ " 15, " "

John M. Dewitt, N. ½ of N. E. ¼ and E. ½ of N. W. ¼ of sec. 15, T. 2 S., R. 2 E.
Samuel F. Ford, N. W. ¼ section 15, T. 2 S., R. 2 E.
Joseph M. Davis, S. E. ¼ " " "
Wm. Cobb, S. W. ¼ " " "
A. J. McCreery, E. ½ of N. E. ¼ and E. ½ of S. E. ¼ of sec. 17, T. 2 S., R. 2 E.
G. W. McCreery, W. ½ of N. E. ¼ and W. ½ of S. E. ¼ of sec. 17, T. 2 S., R. 2 E.
Asa W. Brackett, N. W. ¼ sec. 17, T. 2 S., R. 2 E.
Jose Castello, N. W. ¼ " " "
Wm. H. Davis, S. W. ¼ " " "
John W. Hassinger, N. E. ¼ sec. 19, T. 2 S., R. 2 E.
Hugh McDonald, N. W. ¼ " " "
Theo. F. Hing, S. E. ¼ " " "
Edward Batterman, S. W. ¼ " " "
Charles Whitmore, W. ½ of N. E. ¼ and W. ½ of S. E. ¼ of sec. 21, T. 2 S., R. 2 E.
Stephano Basso, N. E. ¼ of N. E. ¼ sec. 21, T. 2 S., R. 2 E.
John T. Taylor, N. E. ¼ of N. E. ¼ " " "
Henry Colldeweigh, N. E. ¼ of S. E. ¼ and S. E. ¼ of N. E. ¼ of section 21, T. 2 S., R. 2 E.
S. S. Acker, S. E. ¼ of S. E. ¼ sec. 21, T. 2 S., R. 2 E.
Almon Weymouth, S. W. ¼ " 21, " "
John T. Monks, W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of N. W. ¼ sec. 23, T. 2 S., R. 2 E.
James Stewart, E. ½ of N. E. ¼ sec. 23, T. 2 S., R. 2 E.
388 J. M. Harley, W. ½ of N. W. ¼ sec. 23, T. 2 S., R. 2 E.
Robert Carr, S. E. ¼ " " " "
Robert B. Bias, S. E. ¼ of S. W. ¼ " " " "
Hans Hissen, S. W. ¼ " " " "
Benj. F. Bramen, W. ½ of S. W. ¼ " " " "
Fred. T. C. Gries, N. E. ¼ " 25, " "
Henry Hartman, N. W. ¼ " " " "
Francis McHiernan, S. E. ¼ " " " "
James H. Farley, N. ½ of S. W. ¼ and S. E. ¼ of S. W. ¼ of sec. 25, T. 2 S., R. 2 E.
H. C. Smith, S. W. ¼ of S. W. ¼ of sec. 25, T. 2 S., R. 2 E.
Leonard Beck, N. E. ¼ " 27, " "
Etienne Bolifraud, W. ½ of N. W. ¼ sec. 27, T. 2 S., R. 2 E.
Peter Hoppen, E. ½ of N. W. ¼ sec. 27, T. 2 S., R. 2 E.
James F. Ford, E. ½ of N. W. ¼ " 27, " "
M. P. Scott, W. ½ of S. E. ¼ and E. ½ of S. W. ¼ of sec. 27, T. 2 S., R. 2 E.
Thomas Osborn, E. ½ of S. E. ¼ sec. 27, T. 2 S., R. 2 E.
Henry de Young, W. ½ of S. W ¼ " " " "
Cipriano Pacheco, lots 5 & 6 of " 31, " "
Thos. Lindy, lot 4, N. ½ of N. E. ¼ and S. E. ¼ of N. E. ¼ of sec. 31, T. 2 S., R. 2 E.
M. B. Many, lot 4, N. ½ of N. E. ¼ and S. E. ¼ of N. E. ¼ of sec. 31, T. 2 S., R. 2 E.

Heinrich Prall, N. E. ¼ sec. 33, T. 2 S., R. 2 E.
Benj. J. Salisbury, N. W ¼ " " "
E. P. Brangdon, S. E. ¼ " " "
F. R. Fasset, S. W. ¼ " " "
Horace P. Hine, S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼ of sec. 35, T. 2 S., R. 2 E.
389 George W. Harlan, N. E. ¼ of N. E. ¼ sec. 35, T. 2 S., R. 2 E.
O. S. Livermore, N. ½ of N. W. ¼ and N. ½ of S. W. ¼ of sec. 35, T. 2 S., R. 2 E.
Lawrence McCabe, S. ½ of N. W. ¼ sec. 35, T. 2 S., R. 2 E.
J. H. Brackett, W. ½ of N. W. ¼ and W. ½ of S. W. ¼ of section 5, T. 3 S., R. 2 E.
W. H. Ellis, W. ½ of N. W. ¼ and W. ½ of S. W. ¼ of sec. 5, T. 3 S., R. 2 E.
Adam Fath, S. ½ of N. E. ¼ and N. ½ of S. E. ¼ of sec. 9, T. 3 S., R. 2 E.
M. P. H. Lowe, N. ½ of N. E. ¼ and N. ½ of N. W. ¼ of sec. 9, T. 3 S., R. 2 E.
A. J. McLeod, S. ½ of S. W. ¼ and S. ½ of S. E. ¼ of sec. 9, T. 3 S., R. 2 E.
J. M. Worth, S. ½ of S. W. and S. ½ of S. E. ¼ of sec. 9, T. 3 S., R. 2 E.
A. S. Bangs, N. E. ¼ of sec. 13, T. 3 S., R. 2 E.
J. L. Bangs, N. W. ¼ of " " "
Geo. Gerke, S. E. ¼ of " " "
John Fascalind, S. W. ¼ of " " "
E. N. Ackley, N. E. ¼ of S. W. ¼ sec. 15, T. 3 S., R. 2 E.
Wm. Brooks, N. W. ¼ sec. 15, " "
Harrison Brooks, N. W. ¼ " " " "
Geo. P. Overacker, S. E. ¼ " " " "
James M. Bradley, S. E. ¼ " " " "
Fred. Rose, N. E. ¼ " 23, " "
Bigtor Molinos, N. W. ¼ " " " "
Charles Rose, S. E. ¼ " " " "
Edgar D. Ivory, S. W. ¼ " " " "
John Shaffer, N. E. ¼ " 25, " "
Manuel Alviso, N. W. ¼ " " " "
Francis M. Crow, N. ½ of S. E. ¼ and N. ½ of S. W. ¼ of
390 section 25, T. 3 S., R. 2 E.
John J. Crow, S. ½ of S. W. ¼ & S. ½ of S. E. ¼ of sec. 25, T. 3 S., R. 2 E.
Matthew Jesson, W. ½ of N. W. ¼ sec. 35, T. 3 S., R. 2 E.
Jacob R. Sachan, S. W. ¼ " " " "
C. B. Acker, S. ½ of S. E. ¼ " 5, " R. 3 E.
W. H. Tipple, S. ½ of S. W. ¼ " " " "
James Gordon, S. ½ of S. W. ¼ sec. 5, T. 3 S., R. 3 E.
J. W. Clark, N. E. ¼ " 7, " "
Duncan Sinclair, S. E. ¼ " " " "
E. B. French, N. W. ¼ " " " "
John McFlynn, S. E. ¼ " " " "

P. F. Gardner, S. W. ¼ sec. 5, T. 3. S., R. 3 E.
W. W. Colestock, S. W. ¼ " " " "
J. C. Phelps, N. W ¼ " 9, " "
P. H. Hinckley, S. W. ¼ " 9, " "
E. S. Allen, W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of sec. 17, T. 3 S., R. 3 E.
U. J. Stewart, E. ½ of N. E. ¼ and N. ½ of S. E. ¼ of sec. 17, T. 3 S., R. 3 E.
Robert McGlashen, W. ½ of N. W. ¼ sec. 17, T. 3 S., R. 3 E.
J. W. Hampton, S ½ of S. E. ¼ " " " "
P. H. Armstrong, S. W. ¼ " " " "
Timothy Crowley, N. E. ¼ " 19, " "
John Regan, N. W. ¼ " " " "
Joseph Emart, S. E. ¼ sec. 19, T. 3. S., R. 3 E.
Arthur St. Clair, S. W. ¼ " " " "
Edwin Taylor, N. W. ¼ " 21, " "
Annie Little, S. W. ½ sec. 21, T. 3 S., R. 3 E.
Albert Bartholdi, N. E. ¼ sec. 29, T. 3 S., R. 3 E.
Francisco Foscalina, N. W. ¼ sec. 29, T. 3 S., R. 3 E.
Jeremiah Ryan, N. W. ¼ sec. 29, T. 3 S., R. 3 E.
Jose Luis, S. W. ¼ sec. 29, T. 3 S., R. 3 E.

391 The controversy in these cases arises from the following facts, which appear in evidence: On the 10th day of April, 1839, a Mexican grant was made to Jose Noriega and Robert Livermore, called the Las Pocitas rancho. The grant was made for two leagues and was valid for that amount, as is shown by the decisions of the board of land commissioners, the district court, and the Supreme Court of the United States. The decision of the Supreme Court was made on the 24th of January, 1861, and describes the premises as follows: "The land of which confirmation is hereby made is known as the Las Pocitas, and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed."

This decree of the Supreme Court is substantially the same as those rendered by the board of land commissioners and the district court. July 1st, 1862, Congress passed an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes," by which it granted to the "Union Pacific Railroad Company" every alternate section of public land designated by odd numbers,

392 to the amount of five alternate sections per mile, on the line thereof and within the limits of ten miles on each side of said road not sold, reserved, or otherwise disposed of by the United States and to which a homestead or pre-emption claim may not have attached at the time the line of said road should be definitely

fixed. The number of sections was subsequently doubled by act of Congress of July 2d, 1864. An assignment by the Central Pacific Railroad Company to the W. P. R. R. Co. of the right to construct said road and of the lands within the townships named in these cases was recognized and ratified by Congress by act approved March 3d, 1865, entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and to amend an act amendatory thereof, approved July 2nd, 1864.

In pursuance of this legislation the Hon. Commissioner of the General Land Office withdrew the vacant odd-numbered sections within said townships from sale, location, pre-emption, and homestead entry by order of Dec. 23d, 1864, which was received in this office and took effect Jan. 30th, 1865. The withdrawal was for the benefit of the W. P. R. R. Co., and the lands claimed by the pre-emptors were among the odd-numbered sections thus withdrawn. No order restoring said land has ever been made. Arthur St. Clair settled on the land claimed by him in this case on the 21st of Nov., 1868. He is a native citizen of *of* the United States, the head of a family,
393 and has sufficiently improved and cultivated the land claimed by him. All the pre-emption claimants to which the decision in this case applies by stipulation of counsel entered upon the lands in controversy after the withdrawal of lands for the W. P. R. R. Co. under the legislation heretofore refer-ed to.

By the decisions of the Department and of the Attorney General of the United States it is definitely settled that land claimed under an undecided Mexican grant is reserved within the meaning of the act of 1862 granting lands to aid in the construction of the Pacific railroad.

Sargent *et al. vs.* W. P. R. R. Co.
McKillip *et al. vs.* W. P. R. R. Co.

We think the same principles apply to this case, although the grant was but for two leagues, to be selected from lands contained within outside boundaries named in the grant and outlined on the deseño, and also named in the decree of the Supreme Court, — were reserved by the Mexican Government to enable the grantees to select therefrom their two leagues; that this reservation came within the meaning of the aforesaid act of 1862, and that the withdrawal by the Department for the benefit of the W. P. R. R. Co. did not affect the lands within those boundaries. But this raises an important question, to wit, What is the extent and location of the outside boundaries of the grant? There is really, however, but little conflict of testimony upon this point. Counsel for pre-emption claimants insists strenuously upon a latitude of construction for those boundaries for which there is little warrant in the case. The language of
394 description in the grant and in the decree of the Supreme Court conveys a just idea of the extent of the tract from which the selection was to be made by the claimants and of the location of

the boundaries if it is taken in connection with the deseño which the claimants were required to file with the Mexican authorities and which afterward became part of the title papers of the grantees. It is assumed that the deseño, with its delineation of hills, plains, and boundaries, should be disregarded and the so-called Dyer survey be substituted therefor, differing as the latter does from the deseño in shape, extent, and boundary lines. This survey was made in 1865, after the board of land commissioners and the district and supreme courts had recognized the deseño and the original description and after the withdrawal of the lands for the benefit of the railroad company, and it was rejected by the honorable Secretary of the Interior. How this survey can legitimately figure in the case we do not see. It was an afterthought, having no analogy in shape or extent to the boundaries limited by the Mexican Government, as a comparison of it with the deseño will show, and was not even a representation of the claim set up, whether rightfully or wrongfully, by the Mexican grantees.

The Dyer survey was not intended to represent outside boundaries. It was intended to represent the grant itself, and in that sense it was a still more stupendous grab. How iniquitous it was if taken as a measure of the Las Pocitas is shown by the testimony of Dougherty (vol. 1, p-. 216–221) that he was a member of the board of supervisors of Alameda county, and that Livermore applied
395 to the board (see Ex. *a*, W. P. R. R.) to reduce the number of acres on which he was assessed from four leagues to two, saying that he did not own the amount of four leagues of land embraced in the Lewis survey, which reduction was made.

Dyer testifies (vol. 1, p-. 280–286) that he told the attorney of the claimants that it was impossible to make such a survey as he did make and follow the calls of the decree; that at the time of this large survey the claimants were dissatisfied with the attempt to claim so much land and said the only effect would be to delay the issuance of a patent (vol. 1, p. 289); that he embraced in the survey more land than was embraced within the exterior boundaries of the Las Pocitas and did so because the attorney told him to survey eleven leagues, and the survey was made without regard to the decree of confirmation (vol. 2, p-. 325, 326); that the inducement held out to him by the attorney to make a fictitious and exagerated survey was the agreement to sell to him part of the additional land that might be obtained by it at a low price (vol. 2, p-. 326, 327). This fraudulent survey, made against the judgment of the surveyor, in disregard of the calls of the decree of confirmation and of the wishes of the claimants, at the instigation of an attorney, and subsequently rejected by the Department as fraudulent, is now insisted on as a measure of the rights of grantees of the Government whose rights attached before the survey was made. If the calls of the decree could be disregarded to make a survey of 44,000 acres they could be for 444,000 acres or to embrace all contiguous
396 land to any extent. If such a survey could be taken as a representation of the lands embraced in the deseño and description, it would be difficult to say why a county or State map might not be used for the same purpose.

We hold that this survey cannot be considered in determining the outside boundaries of the Las Pocitas rancho.

The deseño gives the shape of the tract and position of its boundaries, and the only further fact needed to make the quantity of reserved land clearly known is furnished by the "Lewis survey," as it is called, which was made for the claimants in 1854 upon the order of the surveyor general, Lewis being his deputy. The lines of this survey were run in accordance with the directions of Livermore, given to the surveyor on the ground, and contained four leagues. By comparing the map of this survey with the deseño it will be seen that their lines are nearly identical. The calls of the description given in the grant papers were obviously followed, and the comparison of the result with the deseño shows it to have been an honest and reliable survey of the outside boundaries of the grant. Within these boundaries as shown on the Lewis map and in the deseño the two leagues decreed by the Supreme Court were afterward selected. When the claimants finally took their smaller quantity of land they did not project their lines at any point beyond those of the Lewis survey.

The Lewis survey may therefore be taken as a correct description of the outside boundaries, first, because it agrees with the
397 deseño and follows the calls of the grant, and, second, because it was made in accordance with the personal and contemporary directions of the original grantees of the Mexican Government (testimony of Murray, vol. 2, p-. 420–430); but it is further shown that the improvements made by the grantees were within the lines of the Lewis survey; that the grantees never claimed outside of the level land (testimony of Alviso, vol. 1, 205); that they made declarations excluding any claim of outside boundaries beyond the lines of the Lewis survey (testimony of Norris, vol. 2, p. 382 *et seq.;* of Dougherty, vol. 1, p. 221), and that the calls for the grant for outside boundaries agree in fact with the Lewis survey. (Testimony of Esden, vol. 1, p-. 225–242.) The acts of the claimants of the Las Pocitas rancho and their declarations to the surveyors, to the board of supervisors, to various neighbors, and others might be considered as estopped in favor of the United States & its grantees. They are certainly valuable in this case as showing that no outside boundaries were claimed, whether rightfully or wrongfully, beyond those shown by the Lewis survey up to the time that the rights of the W. P. R. R. Co. attached.

But they are of less importance, as it is obvious from the testimony and from a comparison of the calls of the grant with the deseño and the Lewis survey that the latter truthfully shows these outside boundaries and to what extent there was a reservation for the purposes of the grant. We therefore hold that the odd-numbered sections within the lines of the Lewis survey were not withdrawn for the benefit of the railroad company, but were reserved within the meaning of the act of 1862, and that all such odd-
398 numbered sections and parts of odd-numbered sections in controversy outside of the Lewis survey were not, at the date

of the withdrawal, reserved within the meaning of said act, and that the pre-emption filings upon the same are invalid.

By this rule we find that all pre-emptors whose claims are situated within the said survey and within the calls of the decree of confirmation and the boundaries delinïated upon the deseño, they being also otherwise qualified, are entitled to enter and pay for their pre-emption claims, provided there is no adverse claim except that of the railroad. Those pre-emptors whose claims are situated partly within and partly without said boundaries and otherwise qualified are entitled to the portion of their pre-emption claims situated within said boundaries, provided there is no adverse claim except that of the railroad. Those pre-emptors whose claims are not within the outside boundaries of the tract reserved for said Las Pocitas rancho as shown by the Lewis survey are not entitled to their lands. We award to the W. P. R. R. Co. all odd-numbered sections and parts of odd-numbered sections with the disputed boundaries outside of the Lewis survey to which a valid adverse claim had not attached prior to January 30th, 1865, the date of withdrawal in this land district for said railroad company.

H. G. ROLLINS, *Register.*

It is hereby agreed and stipulated that the foregoing is a true copy of the original thereof, and may be used *In re* United States of America *vs.* Curtner *et al.* as if the same were duly certified, subject to the objection that the same is immaterial and irrelevant and can have no effect upon the rights of the defendants herein.

H. F. CRANE,
Solicitor for Def'ts.

Filed July 26th, 1887.

L. S. B. SAWYER, *Clerk.*

399 U. S. Circuit Court, Dist. of Cal.

U. S. *vs.* CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "H H." S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed printed copy, with corrections in red ink, of the decision of this office of May 3, 1873, in the case of Arthur St. Clair *vs.* The Western Pacific Railroad Co. is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my [L. S.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

Decision of Com'r of Gen'l Land Office in Arthur St. Clair Case.

Decision of the Commissioner of the General Land Office in the case of Arthur St. Clair *vs.* The Western Pacific Railroad Company.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 3, 1873.

Register and receiver, San Francisco, California.

GENTLEMEN: The case of Arthur St. Clair *vs.* The Western Pacific Railroad Company, involving the right to lots 1 and 2, section 19, township 3 south, range 3 east, Mount Diablo meridian, has been carefully examined and considered. St. Clair filed D. S. 6330 for said tracts March 11, 1870, alleging settlement November 20, 1863. He filed his amended D. S., 7619, July 3, 1871, alleging settlement November 20, 1863. The proof shows that he made his settlement of the 20th of November, 1868. The land in controversy is
400 part of an odd-numbered section within the withdrawal for the said railroad company, made January 30, 1865, and is claimed by said company in part satisfaction of its grant under act of Congress approved July 1, 1862, and subsequent acts amendatory thereof. The railroad was definitely located through a Mexican grant known as Las Pocitas between the 28th of March and the 15th of April, 1868.

The pre-emptor claims the tracts covered by his filing and on which he has made his settlement were reserved by being within the exterior limits or boundaries of the said Mexican grant at and before the date of the said railroad withdrawal and location, and hence did not pass to the railroad, but became subject to pre-emption on the approval of the final survey of the Las Pocitas claim in 1871. The act of July 1st, 1862, making the grant of lands to which this railroad is now entitled, expressly excepted all lands "reserved" by the United States, and it is well settled by repeated departmental decisions that lands embraced within the limits of an unadjusted claim under a Mexican grant are reserved within the meaning of the said act and acts amendatory thereof. Even in cases where it was found and held that the claim was illegal and fraudulent, but presented and asserted in due time and form, it has been held that the reservation of the lands covered thereby was complete until the final judgment rejecting the same, and that the right of the railroad could not attach to such lands because of the reservation, and that when released from such reservation by the final rejection of the claim they became a part of the public domain, subject to pre-emption and homestead entry. It therefore follows that in order to determine the rights of the parties to this controversy it
401 is first necessary to ascertain what the status of these lands was at the time of the definite location of the railroad, in 1868. If at that time they were within the exterior limits of the Las Pocitas claim, they were reserved and excluded from the grant to the railroad. If, however, they were outside of the exterior limits

of the Las Pocitas claim, the right of the road under the grant and withdrawal previously made became perfect at that time, and no settlement or entry made after such withdrawal could affect or defeat the right of the railroad. The grant of the Las Pocitas rancho was made by the Mexican authorities to Jose Noriega and Robert Livermore on the 10th day of April, 1839. This grant recites that "whereas Don Jose Noriega and Don Robert Livermore have petitioned for their own benefit and that of their families the place known by the name of 'Las Pocitas,' bounded by the hillocks of 'Las Pocitas,' which are in the willow grove 'de la Agua,' as far as the mountain range of 'Buenos Ayres,' and the hills of 'los Cuevas,' * * * I have thought proper to grant them said place. * * * The land of which donation is made is of two leagues, a little more or less, as the design annexed to the proceedings with its respective limits explains. The judge who shall give possession will cause the same to be measured agreeably to ordinance in making the boundaries, leaving the excess which might result to the nation for such uses as may be deemed convenient." Judicial possession does not appear to have been given, but the grant was approved by the departmental assembly on the 22nd of May, 1840, by reference to the "place called Las Pocitas del Valle."

On the 27th of February, 1852, Jose Noriega and Robert
402 Livermore petitioned the board of commissioners for ascertaining and settling private land claims in the State of California to confirm their claim, describing it as "a certain tract of land called Las Pocitas, containing two leagues, more or less." On the 14th of February, 1854, the board confirmed the claim, describing the boundaries as follows: "On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less," reference for further description to be had to the map marked C and filed in this cause. The decree of the board was affirmed by the district court of the United States on the 18th day of February, 1859, and by the Supreme Court at the December term, 1860. The judicial confirmation follows that of the board as to boundaries, is limited to two square leagues and confined to the land known as Las Pocitas.

It is apparent from this statement of facts taken from the official records—

1st. That the petition of Noriega and Livermore to the Mexican Government was for a certain place known as Las Pocitas.

2d. That the grant made by the Mexican Government was of said place and confined to two leagues, a little more or less.

3d. That the petition of said Noriega and Livermore to the board of land commissioners for the confirmation of their claim described it as "a certain tract of land called Las Pocitas, containing two leagues, more or less."

4th. That the board confirmed the same as a claim containing in all two square leagues, a little more or less.

403 5th. That the courts affirmed the decree of the board, refer-ng to the claim as "the land known as Las Pocitas, containing in all two square leagues." Just how much land was embraced in the rude sketch or deseño which accompanied the grant for the purpose of indicating the locality of Las Pocitas is impossible to tell, but from the language of the grant, as well as the hills, mountains, and other objects represented on the deseño, I conclude that while it was understood and known that the place Las Pocitas contained only about two square leagues, that the deseño represented a larger quantity, and that the surplus being reserved for the use of the nation was to be excluded by judicial survey, and that until the lines of Las Pocitas were definitely fixed in this or some other manner, which would indicate to the Government the exact position and boundaries of the claim, a larger area than two square leagues might be held and reserved under the claim. What this area was is to be gathered not alone from the deseño, but from the whole record and from the acts and declarations of the grantees. No judicial measurement of the two leagues granted having been made by the Mexican Government prior to the acquisition of California by the United States, Las Pocitas was not, at the time of the confirmation by the board of commissioners, separated from the adjoining private claims and public lands by well-defined boundaries; and therefore confirmation was made of two leagues in all, and reference made to the general outlines named in the grant and imperfectly delineated on the deseño. Subsequent to the decree of
404 confirmation by the board, however, Livermore procured a survey of said rancho by Wm. J. Lewis, a deputy surveyor acting under the instructions of the surveyor general of California. This survey was commenced in the field May 5th, 1854, and completed on the 15th of the same month, about three months after the confirmation of the claim by the board of commissioners, and undoubtedly before the grantees were aware that the Government intended to appeal from the decree of the commissioners, and while they thought that the decree of that board was final; and therefore, so far as their connection with it is concerned, it indicates as clearly what they understood to be the boundaries of their claim, as asserted by them prior to and at that time, as though the survey had not been made prematurely, and no change was made as to the matter of boundaries thereafter by either the district or supreme court, both following the board of commissioners in that respect. The deputy surveyor and his assistants, as well as the surveyor general, supposed that they were making a regular and authorized official survey in accordance with law, as appears from the record, they having taken the oaths and made the certificates usual in the discharge of official duty. This survey contained more than double the quantity of land actually granted and confirmed; therefore while it could not be regarded as a survey of the actual quantity and boundaries of the claim as confirmed and did not bind or preclude the Government from making a final and correct survey of the quantity actually confirmed in accordance with the decree of confirmation, it may be prop-

erly regarded and treated as settling the question as to the lo-
405 cality and exterior boundaries of Las Pocitas, as asserted in the claim presented by Noriega and Livermore to the board of commissioners. It appears from the field-notes and return of this survey made by Deputy Surveyor Lewis that Livermore and his neighbors who owned lands adjoined Las Pocitas were present; that they proceeded from Livermore's house to an oak tree, which was pointed out by Livermore as a corner, and that he also pointed out a line which he claimed as the western boundary of his rancho; that this corner and line were agreed upon as correct; that the survey was commenced at the oak pointed out as aforesaid, which was marked R. L. 1; that at the base of foot-hills, Buenos Ayres ridge, a stake was placed, marked R. L. 2 (subsequently changed to R. L. 5); that on the 8th day of May Augustin Alviso, then the owner of the rancho granted to Jose Dolores Pacheco, having been previously notified, was present, and pointed out a line running from oak marked R. L. 1 as the boundary between his land and that of Livermore, in which the latter concurred. This line terminated at the foot of the Cuevas Hills, the same being the northwest corner of Las Pocitas. At this point a large stake was placed, marked R. L. 2; from this stake the northern boundary of the rancho was run, as near as practicable, along the base of the Cuevas Hills to a stake marked R. L. 3; from stake R. L. 3 a line was run, following in its general course the base of the Buenos Ayres ridge, to stake marked R. L. 4, the eastern corner of the rancho; from stake R. L. 4 a line was run to a stake marked R. L. 5 (which had been at first marked R. L. 2). It appears from this that the line from the oak pointed out by Livermore
406 as his corner and marked R. L. 1 to the stake R. L. 5, at the base of the Buenos Ayres ridge, and dividing Las Pocitas from what was known as the establishment of San José, mentioned in the decree of confirmation as one of the boundaries, was run in the presence of the neighboring proprietors, and was satisfactory to them and to Livermore; that the line run from the oak R. L. 1 to stake R. L. 2, at the foot of Cuevas Hills, being the line between Las Pocitas and the Pacheco rancho, also named in the decree of confirmation as one of the boundaries, was run in the presence of the owner of the latter, and when he pointed out the line Livermore concurred with him. From stake R. L. 2 the northern boundary of the Rancho Las Pocitas was run as near as practicable along the base of the Cuevas Hills to stake R. L. 3. This appears to have been in exact conformity to the grant, which refers to the hills Las Cuevas as a boundary, and to the decree of confirmation, which says, in describing the boundaries, "on the north by the Lomas de las Cuevas." From stake R. L. 3 to stake R. L. 4 the line followed in its general course the base of the Buenos Ayres ridge, which is also in accordance with the grant and confirmation. Some doubt was entertained as to whether the latter line should be run at the base or summit of the Buenos Ayres ridge, but Livermore settled this, as will be seen from the following quotation from report of the deputy surveyor: "The calls in the grant of the rancho might perhaps authorize the running of the eastern boundary along the summit instead of at the

base of the mountain, but no such construction is asked by
407 the claimant (Robert Livermore); on the contrary, he expressed himself as entirely satisfied with the boundaries as I surveyed them and as represented in the accompanying map."

The surveyor general approved this survey as a survey of Las Pocitas, executed in conformity to the confirmation of the board of land commissioners. His approval is dated June 19, 1854. That this survey was evidently made pursuant to act of Congress approved August 31, 1852, by the proper officers, under instructions and the sanction of the proper oath, executed with all due formality and care, under the immediate supervision of Livermore, who pointed out his corners and lines, and who, after the work was fully completed, expressed himself as entirely satisfied with boundaries as surveyed, — contained all the land within the exterior boundaries of the grant made by the Mexican Government and described in the petition of Noriega and Livermore for confirmation, and in the decree of confirmation, cannot be doubted. The theory upon which the survey was based, as well as the manner of its execution, shows clearly that the grantees were not limited as to quantity in accordance with the decree of confirmation, which confined them to two square leagues, but the exterior boundaries of their claim as they and their neighbors understood them at the time of the survey and before. The deputy surveyor, in making his return, says: "It may be proper before closing these observations to remark that in the petition to the Mexican authorities, which precedes the grant and forms part of the expediente, the land is described as two
408 leagues, a little more or less, in length along the valley, and about the same in width across the valley, and bounded on the side of the Cuevas Hills and the Sierra of Buenos Ayres by the margin of the hills. I have no doubt that it was the intention of the Mexican Government to grant the land more particularly described, and that the survey as made fulfills the intention." The surveyor general, in approving the survey, said: "In their decree they state the quantity to be two leagues, a little more or less, but the specific quantity actually found within the boundaries mentioned in the said decree is four square leagues, 3,485.59 acres."

Thus it appears that the surveyor general and the deputy surveyor in making this survey acted upon the theory that the grantees were entitled to all the land included within the exterior boundaries mentioned in the grant and decree of confirmation regardless of quantity. These boundaries were pointed out by Livermore and the survey made accordingly. It therefore must have included all the land claimed at and before that time by the grantees, and all that they asked the board to confirm, and, as I have heretofore shown, it embraced more than double the quantity actually granted and confirmed. The remark of the deputy surveyor as to the statement in the original petition confining the claim within the margin of the hills accounts for Livermore being satisfied with the line run at the base of the hills and harmonizes the claim and the survey thereof made by Lewis with the terms of the grant, which
409 *which* was of the "Place Las Pocitas," reserving the excess to

the nation. This survey was made in 1854, while Livermore was alive. He died in 1858. There is not one word in the record tending to show that he at any time expressed dissatisfaction with the survey or desired to have it modified or changed in any respect whatever, and there is no evidence showing that his heirs objected to it prior to 1865, which was after the withdrawal for the railroad company. Then they were advised by an attorney that under the decree of the Supreme Court they might possibly receive more than two square leagues. Under this advice the enlarged survey by Dyer of 43,011.31 acres was executed, but it was made at the request of parties claiming to be attorneys for the heirs, and it does not appear that even at that time the heirs had any personal connection with the matter further than to protest against the movement to expand the ranch beyond its legitimate and long-recognized boundaries, on the ground that it would delay them in securing a patent for the lands to which they were entitled. It is, therefore, in my opinion clear that the exterior boundaries of the place Las Pocitas as claimed, as granted, and as represented to the board of confirmation by Noriega and Livermore were ascertained, marked out on the face of the earth, and fixed to the entire satisfaction of the grantees by this Lewis survey made in 1854, and that neither the grantees nor their heirs repudiated or objected to the boundaries until after the surrounding lands had been open to survey and sale and some
410 of them withdrawn for the railroad. The exterior boundaries of Las Pocitas having been thus ascertained and determined in 1854 and acquiesced in by the grantees and their heirs from time to time until after the withdrawal for the railroad, the lands outside of the boundaries of the Las Pocitas, as ascertained and fixed by the Lewis survey, were, from that time at least, a part of the public domain, and as such subject to survey and such disposition as the Government thought proper to make of them, and were, therefore, properly withdrawn as inuring to the railroad company under its grant, and no claim or settlement presented or made after the date of the withdrawal could have the effect to defeat the right of the railroad. In support of this view I may briefly refer to the state of affairs in California immediately after its acquisition and the congressional legislation of 1851 and 1853, relating to lands in that State. By the treaty of Guadalupe Hidalgo, Mexico ceded California to the United States, but it was understood and agreed that private property should be respected, and therefore Congress wisely provided, by act approved March 3, 1851, entitled "An act to ascertain and settle private land claims in the State of California," for the presentation of private land claims to a board of land commissioners, who had power to confirm or reject them, subject to the right of appeal to the district court of the United States, and from thence to the Supreme Court. Under this act parties were limited to two years from the date thereof to present their claims to the board, and if they did not present them at that time they were absolutely and for-
411 ever barred, and it was provided that "all lands the claims to which shall not have been presented to said commissioners

within two years after the date of this act shall be deemed, held, and considered as part of the public domain of the United States." Pending the presentation of these claims Congress made no provision for the sale of the public lands in California or for opening them to settlement; but on the 3d of March, 1853—the very day the time for presenting private land claims to the board expired—it, by an act entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," provided for the survey and sale of the public lands of California, excepting only sixteenth and thirty-sixth sections, lands appropriated by the act or reserved by competent authority, lands claimed under any foreign grant or title, and mineral lands.

Now, it is evident from this legislation—

1st. That Congress did not open the lands in California to settlement and sale for two years from March 3, 1851, giving that time to private claimants to present their claims according to their respective rights and boundaries.

2d. That the moment that period expired it opened all the lands to survey, settlement, and sale except those lands specially reserved, among which were "lands claimed under any foreign grant or title." The act of March 3, 1853, refers to lands claimed, and undoubtedly means the lands embraced in a claim previously presented to
412 the board of commissioners for confirmation, and not to lands covered by claims which might be asserted thereafter, for the time had then expired for the presentation of claims. This brings us back to the question as to what was included in the claim of Noriega and Livermore as presented to the board of commissioners. The question is not what was finally confirmed to them, but what they presented for confirmation, for the act of March 3, 1853, recognized as reserved what was then claimed under a foreign grant or title, and the reservation thus made was continued until the final decree of the proper tribunal affirming, rejecting, or modifying the claim. The answer to the question as to what was presented to the board for confirmation and reserved in this case of Las Pocitas until the final decree of the Supreme Court, at the December term, 1860, and the approval of the final survey of the grant, in 1871, is already given in my remarks on the Lewis survey. That survey fixed the exterior boundaries of the rancho, and the grantees, in pointing out and adopting the boundaries fixed by it, said to the Government and to all the world that the lands embraced within these lines constituted the whole of their claim, and that beyond these lines they had no interest or right whatever. From that day the Government had a right to treat the lands outside of the claim thus surveyed as public lands, and it did so treat them by surveying and opening them to market and withdrawing them for the railroad. The subsequent presentation of a claim under a survey or otherwise, embracing more lands or other lands than those presented to the board for confirmation, could
413 not affect the question, for the time, as we have seen, had elapsed in which private claims could be presented directly for confirmation, and it would be absurd to say that a party could do indirectly, by an expansion of his claim under a false or fraudu-

lent survey, what he was precluded from doing directly by its presentation. The adoption of such a rule would not only be contrary to law and unjust to the railroad company in this particular case, but it would retard the growth and prosperity of the State of California and ruin and impoverish thousands and tens of thousands of honest, *bona fide* settlers upon the public lands by enabling rapacious and unprincipled speculators to tie up and suspend from entry for indefinite periods of time immense portions thereof under the thin guise or pretense that they were once embraced in some Mexican grant; that they could find deputy surveyors pliant and flexible enough to disregard and pay no attention to grants and decrees of confirmation and run lines wherever speculators desire them is evident from the Dyer survey and Dyer's testimony in this case, which shows that a rancho of two square leagues in all, according to the decree of confirmation, was surveyed to suit an attorney, so as to embrace over 43,000 acres, or nearly ten square leagues. There is a voluminous record of testimony in this case, most of it irrelevant and contradictory, but I think, taking the record as a whole, it is clearly established that the Lewis survey was a correct delineation of the exterior boundaries of Las Pocitas, and I therefore decide that all the odd-numbered sections outside of said Lewis
414 survey inure to the railroad under its grant, and that all odd sections within the survey, being reserved by the claim of Las Pocitas until after the definite location of the road, in 1868, did not pass to it under its grant, and, upon the approval of the final survey of Las Pocitas, became subject to pre-emption entry. Upon this principal I award lots 1 and 2, section 19, township 3 south, range 3 east, to the railroad company, and reject the claim of St. Clair thereto, subject to the right of appeal within sixty days from notice, &c.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

415 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "I I." S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *November 25th*, 1874.

I, S. S. Burdett, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of the appeal of B. B. Newman, att'y for settlers in the case of Arthur St. Clair *et al. vs.* The W. P. R. R. Co., now on file in this office.

In testimony whereof I have hereunto subscribed my [L. S.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. S. BURDETT,
Commissioner of General Land Office.

Notice of Appeal in the Arthur St. Clair Case.

In the Department of the Interior, Washington, D. C.

ARTHUR ST. CLAIR, Pre-emption Claimant,
vs.
THE WESTERN PACIFIC RAILROAD CO., Contestant.

Notice of appeal by Arthur St. Clair *et al.* to Hon. Secretary of the Interior.

B. B. NEWMAN,
Att'y for Appel-ants.

Filed July 7, 1873.

H. G. ROLLINS, *Register.*

In the Department of the Interior, Washington, D. C.

ARTHUR ST. CLAIR *et al.*, Pre-emption Claimants,
vs.
THE WESTERN PACIFIC RAILROAD COMPANY, Contestants.

416 Notice of appeal to Honorable C. Delano, Secretary of the Interior, by Arthur St. Clair and the other pre-emption claimants interested with him, under the stipulation entered into herein between the counsel therein, from the decision signed by the honorable Commissioner of the General Land Office on the 3d day of May, 1873, in the above-entitled contest:

The following-described quarter sections and fractional parts of sections of land are involved and embraced in this appeal, under the stipulation referred to above, and to be found at p. 126 of the printed transcript of the evidence in this contest, viz:

S. E. ½	section	9,	township	2	S., R.	1 E.
S. E. ½	"	11,	"	2	" "	"
All of	"	13,	"	2	" "	"
All of	"	15,	"	2	" "	"
E. ½	"	21,	"	2	" "	"
All of	"	23,	"	2	" "	"
All of	"	25,	"	2	" "	"
All of	"	27,	"	2	" "	"
N. E. ¼	"	33,	"	2	" "	"
All of	"	35,	"	2	" "	"
S. ½	"	7,	"	2	" "	2 east.
S. ½	"	9,	"	2	" "	"
All of	"	15,	"	2	" "	"
" "	"	17,	"	2	" "	"

All of section 19, township 2 S., R. 1 E.
E. ½ and N. W. ¼ " 23, " 2 " " "
All of " 25, " 2 " " "
All of section 31, " 2 " " 2 east.
417 N. W. ¼ section 1, township 3 south, range 1 east.
S. W. ¼ " 23, " 3 " " 2 "
All of section 25, township 3 south, range 2 east.
E. ½ " 27, " 3 " " 2 E.
N. ½ " 35, " 3 " " "
All of " 5, " 3 " " 3 E.
W. ½ " 9, " 3 " " "
S. ½ " 17, " 3 " " "
All of " 19, " 3 " " "
W. ½ " 21, " 3 " " "
All of " 29, " 3 " " "
N. ½ " 31, " 3 " " "
N. ½ " 33, " 3 " " "

The pre-emptors within the lines designated as the "Lewis survey," by the decision appealed from, having been awarded their lands by said decision, have no complaint to make, and hence do not appeal herein.

The grounds of appeal are—

I. That the decision is contrary to the evidence.

II. That the said decision is contrary to law. Under the first assignment of error, namely, "That the decision is contrary to the evidence," we proceed to point out specifically in what. First, in this: that the evidence shows that there was a grant duly made of the Rancho "Los Pocitas" to Jose Noriega and Robert Livermore by the duly constituted authorities of the Mexican nation on the 10th day of April, 1839, and that the same so granted was designated by exterior boundaries and by a deseño or map in the
418 ordinary and customary way, and that the land so designated was and is well known and easily defined and ascertained upon the ground, and that the same was duly ascertained by the board of land commissioners constituted for that purpose and by the district and supreme courts of the United States confirming the same. In support of this point we refer to the following evidence:

I. The duly certified copy of the original deseño and expediente offered in evidence by the pre-emption claimants, marked and designated as Exhibit "A," St. Clair, and referred to and mentioned near the bottom of page 3 and top of page 4 of printed evidence in this case.

II. The duly certified copy of the petition of said Noriega and Livermore, presented by them to the board of land commissioners, praying for a confirmation of said grant to them and referred to in the second last line of pag- 4 of said printed transcript.

III. The opinion and decree of said commissioners upon said petition and upon the confirmation of said grant and referred to and mentioned in middle of page 5 of said printed evidence, being Exhibit "B," St. Clair.

IV. The duly certified copy of the decree of the district court of

the United States confirming said grant to Noriega and Livermore, referred to and mentioned in the sixth line from the bottom of page 5 of said printed evidence and being Exhibit "C," St. Clair.

V. The duly certified copy of the decree of confirmation of the Supreme Court of the United States confirming said grant to said Noriega and Livermore and referred to and mentioned in the second line from the top of page 6 of printed evidence and
419 being Exhibit "D," St. Clair.

VI. The duly certified copy of the survey of said Rancho "Las Pocitas," made in the month of October, 1865, by the surveyor general of the United States, by his deputy, E. H. Dyer, and the approval of said survey by said surveyor general in the month of February, 1867, referred to in the seventh line from the top of page 6 of printed evidence, being Exhibit "E," St. Clair.

VII. The certified copy of the decision of Hon. O. H. Browning, Secretary, rendered upon said survey on the 30th day of July, 1868, showing that therein the Hon. Secretary recognized the exterior boundaries of said grant "Las Pocitas" as being the same contended for by these pre-emptors, referred to in the 16th line from the bottom of page 6 of said printed evidence, and is Exhibit "F," St. Clair.

VIII. The certified copy of the decree of Hon. J. D. Cox, Secretary, rendered on the 4th day of December, 1869, upon said survey, showing that he also recognized the exterior boundaries of "Las Pocitas" as being those contended for by these pre-emptors. The same is referred to in the first line of page 7 of printed evidence, and is Exhibit "G," St. Clair.

IX. The duly certified copy of the advertisement of the said survey of said grant "Las Pocitas" as containing $43{,}011\frac{31}{100}$ acres, referred to in the 17 line from the bottom of p. 7 of printed evidence and being Exhibit "J," St. Clair.

X. The duly certified copy of the letter of instructions from Hon. Jos. S. Wilson, Commissioner of the General Land Office, dated June 30th, 1870, to the register and receiver of the United States land office, instructing them not to receive or recognize any claims
420 to lands within the exterior boundaries of "Las Pocitas." The land referred to in that letter, as will be seen, lies outside of the sham lines designated in the decision appealed from as the lines of the "Lewis survey." The same is referred to in the 19th line from the bottom of page 8 of printed evidence, & is Exhibit "M," St. Clair.

XI. The duly certified copy of the letter of instructions from the said Commissioner to said register and receiver, dated June 14th, 1871, instructing them to release from reservation and suspension the lands within the exterior boundaries of "Los Pocitas" not embraced in the final official survey of said grant as embracing two square leagues, or 8,880 acres, refer-ed to in the 6th line from the bottom on page 8 of printed evidence and being Exhibit "N," St. Clair.

XII. The evidence of Mr. E. S. Allen, beginning at line 6, in page 9, and ending with line 30 of same page, clearly showing that the exterior boundaries of "Las Pocitas" as designated in the decree of

confirmation thereof by the board of commissioners and the courts are well known and easily designated upon the ground.

XIII. The evidence of the witness Clark, which clearly corroborates that of Allen as to the identity of the location of the exterior boundaries of "Las Pocitas," as mentioned in the decree of confirmation. This evidence will be found beginning at the fifth line from the bottom of page 16 of printed evidence down to and including the fifth line from the top of page 18 of said printed evidence. To the same effect is the evidence of Arthur St. Clair, beginning at the middle of page 29 of printed evidence down to and including the 4th line on p. 30 thereof.

421 XIV. The evidence of Mr. Thompson, the well-known deputy United States surveyor, upon being asked the following question: Question. "With deseños at pages 6 and 26, 'Exhibit A,' St. Clair, and the decree of the board of land commissioners to be found on pages 24 and 25 of 'Exhibit B,' St. Clair, would an intelligent surveyor have any unreasonable difficulty in designating *in designating* the exterior boundaries of the Rancho 'Los Pocitas' on the ground?" Answer. "I do not think that they would. The description given is about as definite as usual." This question and answer is found on page 57 of printed evidence, beginning at the 16th line from the bottom and ending with the 11th line therefrom.

XV. The testimony of Joseph L. Bangs, which sustains the evidence of the other witnesses as to the clear existence and well-known location of the exterior boundaries of Las Pocitas as designated in the decrees of confirmation thereof. The evidence of this witness will be found on page 85 of printed evidence, beginning at the 20th line from the bottom and ending with the 11th line from the bottom of page 86 of said printed evidence.

XVI. The testimony of J. H. Clark is to the same effect as clearly showing the well-known lines of the exterior boundaries of "Las Pocitas" as designated in the decrees of confirmation thereof by the commissioners and courts. This testimony will be found beginning at the 10th line from the bottom of page 86 of printed transcript of the evidence down to the middle of page 88 of said transcript.

XVII. The testimony of H. C. Smith, beginning at the third line from the top of page 92 and ending with line 8 of page

422 103 of said printed evidence, fully shows the possession of Livermore and the extent thereof to be to the exterior boundaries of "Las Pocitas" as designated in the decrees of confirmation by the commissioners and courts of the United States. The long and intimate acquaintance of this witness with Livermore, beginning as early as 1846, and the high official possitions held by him in the midst of the people of Alameda county, where he settled as early as 1846 under the banner of the American general, John C. Fremont (see page 92 of printed evidence), must demand for the testimony of this witness more than ordinary respect and weight. It establishes the facts contended for by the appellants beyond any doubt.

XVIII. The testimony of Wilson, beginning at the 12th line of page 103 and ending with the 15th line of page 105 of printed tran-

script. The evidence of this witness is also most conclusive of the points and facts insisted upon by the appellants.

XIX. The testimony of Edward B. Carroll, beginning at the 10th line from the bottom of page 120 and ending with the 17th line from the top of page 124 of printed evidence. The early acquaintance of this witness with the Mexican grantee, Livermore, and the circumstances which led Livermore, in 1854 (see page 121 of printed evidence), to point out to this witness the exterior boundaries of "Las Pocitas," must impress all with the truth of the testimony of this witness, and, such being the case, it establishes the facts contended for by these appellants beyond question.

XX. The official report of the Commissioner of the General
423 Land Office for the year 1866, to be found beginning at the 25th line from the bottom of page 126 and ending with the 19th line from the bottom of said page of printed transcript, showing that that officer officially reported that all the land embraced in the $43{,}011\frac{31}{100}$ acre survey, being Exhibit "E," St. Clair, *were* within the exterior boundaries of "Las Pocitas" and included and embraced in said grant and was a part thereof.

XXI. The official plat of the survey of township 3 south, range three east, of the Mount Diablo meridian, filed in the United States land office on the 28th of December, 1865, showing that the land claimed by St. Clair in section 19 in said township was excluded from the public land embraced in said plat on account of the same being a part of the grant "Las Pocitas." The appellants insist that the testimony referred to shows beyond any possibility of a doubt that the Mexican grantee, Livermore, claimed, occupied, possessed, and used for the pasturage of his five thousand head of stock and cattle the whole of his grant; as—

I. Petitioned for by him and Noriega to the duly constituted authorities of the Mexican nation in 1839.

II. As granted to him and Noriega by said authorities on April 10th, 1839.

III. As confirmed to him and Noriega in 1840 by the departmental assembly of the Mexican nation.

IV. As designated in the petition of said Livermore and Noriega, presented by them to the board of land commissioners in 1852, for a confirmation of said grant "Las Pocitas" to them.

424 V. As designated, described, and mentioned in the decree of said board, rendered on the 14th day of February, 1854, confirming said grant upon said petition to said Noriega and Livermore.

VI. As designated, described, and mentioned in the decree of the district court of the United States confirming said grant to said grantees, rendered on the 18th day of February, 1859.

VII. As confirmed by the Supreme Court of the United States on the 6th day of February, 1861.

VIII. And as officially surveyed by the United States surveyor general in the month of October, 1865, as embracing nearly all the lands within the said exterior boundaries of said "Las Pocitas," being $43{,}011\frac{31}{100}$ acres, at all times up to the date of his death in

1858, and his heirs, executors, and assigns after him, until the last official survey of said grant was made in the month of March, 1869, when the specific two square leagues was set apart and the "sobrante" called into being for the first time. Upon the second point of appeal, namely, "the decision appealed from is contrary to law," the appellants now proceed to show in what—

First. In this, that the said decision states that the land in controversy was granted to the "Western Pacific Railroad Company" by the act of Congress of July 1st, 1862, and the acts amendatory thereof, whereas the said act of July 1st, 1862, does not even name or mention the said Western Pacific Railroad Company, and, as will be seen from the act itself, granted no lands whatever to said Western Pacific Railroad Company. Hence the decision in this
425 respect is contrary to law and the evidence.

Second. It is admitted by the decision appealed from that the line of the Western Pacific railroad was not definately located "through the Mexican grant 'Las Pocitas' between the 28th of March and the 15th day of April, 1868." Hence the decision is contrary to law, inasmuch as at these dates the land claimed by Mr. St. Clair and the other appellants herein was and at all times between the two dates named and long prior and subsequent thereto a part of said grant and of the then official survey thereof; hence was neither public land or land granted to said company or any other company, and therefore the said decision is in this respect contrary to law and to the evidence.

Third. It is admitted by the decision appealed from that the said act of Congress of July 1st, 1862, making the grant of land to which this railroad is now entitled, expressly "excepted all lands reserved by the United States," and that is well settled by repeated departmental decisions that lands embraced within the limits of an unadjusted claim under a Mexican grant are reserved within the meaning of the said act and the acts amendatory thereof; even in cases where it was found and held that the claim was illegal and fraudulent, but presented and asserted in due time and form, it has been held that the reservation of the lands covered thereby was complete until the final judgment rejecting the same, and the right of the railroad could not attach to such land because of the reservation, and that when released from such reservation by the final rejection of the
426 claim they became a part of the public domain subject to pre-emption and homestead entry. It therefore follows that in order to determine the rights of the parties to this controversy it is first necessary to ascertain what the status of this land was at the time of the definite location of the railroad in 1868. If, at that time, they were within the exterior limits of the "Los Pocitas" claim, they were reserved and excluded from the grant to the railroad. Hence the decision is contrary to these admissions, the evidence in the case, and the law governing the rights of the appellants, in this:

I. That the evidence fully shows that in 1839 the Mexican grantees of the grant "Las Pocitas," Noriega and Livermore, presented a petition and deseño or map showing the exterior boundaries of the land solicited by them of "Los Pocitas" to the proper authorities.

II. That on the 10th day of April, 1839, the duly constituted authorities of the Mexican Government granted "Los Pocitas" upon said deseño or map and petition to said petitioners, Noriega and Livermore.

III. That on the 22nd day of May, 1840, the departmental assembly of the Mexican nation duly approved and confirmed said grant as previously granted by the proper governor, and to the full extent thereof as designated by the petition and shown by said deseño or map, to said Noriega and Livermore.

IV. That upon petition duly presented to them by said Noriega and Livermore, the board of land commissioners duly constituted under the act of Congress of March 3d, 1853, entitled "An act to ascertain and settle private land claims in the State of Cali-
427 fornia," duly confirmed said "Las Pocitas" to said Noriega and Livermore, designating (in the decree of confirmation) the boundaries of said grant to be as follows: Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all (within those boundaries and none others) two square leagues, provided that quantity should be contained within the boundaries named; but if less than that quantity should be found therein, then the less quantity was confirmed.

V. That upon appeal by the United States from said decree of confirmation of said board to the district court of the United States the said district court, on the 18th day of February, 1859, duly and solemnly confirmed, ordered, adjudged, and decreed the boundaries of said grant to be as follows: Bounded on the north by the Lomas de los Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolore Pacheco, containing in all, "within these named boundaries," two square leagues, provided that quantity should be contained therein; but if less, then the less quantity was confirmed.

VI. That upon appeal to the Supreme Court of the United States by the United States from this solemn decree of the district court, filing and locating the boundaries of the land confirmed by it, the said Supreme Court, at its December term, to wit, on the 6th day of February, 1861, duly affirmed the said decree of the said dis-
428 trict court in all things, and as the effect of such affirmation solemnly ordered, adjudged, and decreed that the boundaries of the said ranch "Las Pocitas" *was* and are: On the north — the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José; and on the west by the rancho of Don Jose Dolores Pacheco, containing within these boundaries, and no others, two square leagues, provided such quantity was contained therein; but if less than these two square leagues was contained therein, then less than two square leagues was confirmed.

VII. That the United States surveyor general for the State of California, by his duly authorized deputy surveyor, in the month of

October, 1865, under these solemn decrees and the solemnity of the usual official oaths, duly surveyed said confirmed grant to the extent of said exterior boundaries; conscient-ly believing that all the land within the boundaries solemnly designated by the solemn decree of the highest judicial tribunal of the nation—the Supreme Court of the United States—awarded and confirmed all the land within the said exterior boundaries so named in said decree to said Noriega and Livermore, surveyed the same, which that surveyor found, upon his solemn oath, to contain 43,011.31 acres. Upon these grounds appellants say the decision appealed from is clearly and beyond any doubt contrary to law and the evidence.

Fifth. It is admitted by the decision appealed from that "the grant, the grant of 'Las Pocitas' rancho, was made by the Mexican authorities to Jose Noriega and Robert Livermore on the 10th
429 day of April, 1839." The exterior boundaries of the grant so made having been judicially located and fixed to natural objects upon the ground by the decrees of the board of commissioners authorized by law for that special purpose and by the district and Supreme Court of the United States, it does not lie in the mouth of the executive department of the Government, even were the honorable commissioner, who is constituted by law to decide the present case and others of its kind, to decide it, much less when an employé in his office or department does so, to make new or any other boundaries of "Las Pocitas," other than those designated, described, mentioned, & ascertained by these judicial tribunals, whose exclusive special province it was to ascertain them; hence appellants contend that the decision appealed from is clearly contrary to law and the evidence.

Sixth. The decision appealed from is composed of purely abstract absurdities, and when it undertakes to say that while the "Lewis survey" was prematurely made, and while it did embrace "double the quantity confirmed," etc., and "while it could not be regarded as a survey of the actual quantity and boundaries of the claim as confirmed, and did not preclude or bind the Government from making a final and correct survey of the quantity actually confirmed in accordance with the decree of confirmation; yet it (Lewis survey) may be "properly regarded" and "treated as settling" the exterior boundaries of "Las Pocitas," etc. To this purely abstract absurdity the attorney for the appellants says that the decision appealed from in respect to that portion of it last quoted resembles more the argu-
ment of a partizan than a quasi-judicial decision. It lacks
430 fairness of statement as well as legal or just conclusions. How could any judicial tribunal, demanding that respect from both the attorneys and litigants before it to which under ordinary circumstances it is entitled, judicially determine in a dispute or controversy between litigants before it, the question alone involved being exclusively the "location of the exterior boundaries of a grant," which should hold that "an illegal and void survey (as was the Lewis survey, so called), that the lines designated by it upon the ground were the lines of the exterior boundaries of such grant, when in the face of such an assertion a tribunal especially constituted by

law, to wit, the board of commissioners appointed under the act of Congress, approved on the 3d day of March, 1851, entitled "An act to ascertain and settle private land claims in the State of California," about three months before the execution of said survey solemnly decreed the boundaries to be entirely different? Now, what impartial mind will hesitate for an instant to say that a decision that set up the lines of Lewis' illegal survey as being the lines of the "exterior" boundaries of such grant, when said commissioners designate, name, and mention other and different and natural boundaries as the exterior boundaries thereof, is either an impartial adjudication or one made according to law? No such person could or can be found. But when the evidence goes further and shows, as in this case, that the district court of the United States, nearly five years after the execution of this both fraudulent and illegal survey (known as the Lewis survey) and with it in existance, yet wholly disregard it, and, in its face, on the 18th day of February, 1859, rendered
431 the following solemn order, judgment, and decree fixing the exterior boundaries of "Las Pocitas:"

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Friday, the 18th day of February, A. D. 1859.

Present: The Honorable Ogden Hoffman, district judge.

THE UNITED STATES
vs.
JOSE NORIEGA and JOSE LIVERMORE, Executor, and JOSEPHA NYRICARDA LIVERMORE, Executrix, of the Last Will and Testament of Robert Livermore, Deceased.

This cause came on to be heard on appeal from the final decision of the board of commissioners to ascertain and settle private land claims in the State of California under the act of Congress approved March 3d, 1851, upon the transcript of the proceedings and decision of said board of commissioners and the papers and evidence on which the said decision was founded, and upon the further evidence filed in this court, and it appearing to the court that the said transcript has been duly filed according to law, and the cause having regularly came to a hearing, it is by the court hereby ordered, adjudged, and decreed that the said decision be, and the same is hereby, in all things affirmed; that the claim of the appellees is a good and valid claim, and that the same is hereby confirmed.

The land of which confirmation is hereby made is known
432 as "Las Pocitas" and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, provided

that quantity be contained therein; — then that less quantity is hereby confirmed.

Dated San Francisco, February 18th, A. D. 1859.

OGDEN HOFFMAN,
U. S. District Judge.

(Endorsed:) Filed February 18th, 1859. Wm. H. Cheevers, clerk.

(Duly certified.)

This decree, being founded upon new evidence presented to the court, as well as upon the evidence offered and produced before the board of land commissioners, judicially fixed the survey and located the exterior boundaries of the grant "Las Pocitas," and the same having been duly in all things affirmed by the Supreme Court of the United States on the sixth day of February, 1861, irrevocably for all future time fixed and designated the exterior boundaries of "Las Pocitas." Within the lines so designated there was no public land until the official ascertainment of the fact whether there *was* two leagues or more within the boundaries so designated, described, and mentioned; for it will be clearly seen from the decree of the commissioners, as well as the district court, that they only qualifiedly confirm the two leagues, for if that quantity should
433 not be found within the boundaries designated in these decrees only the whole of the land within these designated boundaries was conformed, if the same did not exceed two square leagues, and Lewis' fraudulent illegal survey being in existence at the time of the rendition of this decree of the district court, and the same having been ignored by it, it savors of insignificant contemptibleness for any employé in an inferior executive tribunal to undertake to say that the boundaries thus designated by the solemn decrees of these high judicial tribunals are not the boundaries thereof, but some others are. This sort of assumptions on the part of executive, inferior, and subordinate tribunals would set at nought every decree rendered by the board of commissioners and the highest judicial tribunals of the nation and thus anew open that which has been judicially set at rest.

We insist that this shall not be done in this case no more than in any other. It would be a waste of time to follow the insignificant assumptions of the decision appealed from. Its unfounded statements are so grossly unwarranted that we deem it our duty to pass it over with the remark that when it states that the "exterior boundaries of 'Las Pocitas' were ascertained and settled by the Lewis survey, in 1854," it states what is grossly unwarranted either by the evidence or the law of the case and such as no employé in any tribunal having the slighest respect for its own reputation or the rights of others would condescend to indite, involving as it does the turning out of doors and from their homes of nearly fifty separate families, many of them containing infant children,
434 married and unmarried women, as well as aged men, by giving over their sweet homes to a band of land thieves who by every corrupt method that their cunning knavery can devise seek

to deprive the appellants of their lands and homes. The disquisition in the decision of the attempted history of the land titles of California, for the purpose of bolstering it up, shows how wanting in materials the employé who wrote it is when he asserts that the act of Congress, approved March 3d, 1851, entitled "An act to ascertain and settle private land claims in the State of California," which by the first section of it was made to exist for three years from the date of its passage, expired by its own limitation on the 3d of March, 1853. It is a contemptible method to bolster up the grossest subterfuge that has ever been signed, and it would be a gross departure from the line of my duty as the attorney of the appellants for me to meekly bow down and with cur-like submission refrain from applying such appropriate language and epithets to the decision appealed from as its unfoundedness fully demands, constructed and written as it was and is, not by the Hon. Commissioner of the General Land Office, but by an employé in his department, and although signed by the Hon. Commissioner — knew no more of its contents that the President of the United States, who never heard of or saw it.

I might well be considered beneath the contempt of all should I sit mutely and suffer the happy homes, improvements, and lands of the numerous appellants who have confided their homes and improvements to my integrity, intelligence, and care to be given
435 over to a fraudulent band of men, living upon their wits in San Francisco and its vicinity, without solemnly protesting against such an unwarrantable determination.

In conclusion we again insist, as we did before the Hon. Commissioner in this case, that the official records in the Interior Department clearly show that the Central Pacific Railroad Company of California, under the provisions of the seventh section of the act of Congress approved July 1st, 1862, located the western terminus of it- road on the navigable waters of the Sacramento river on or about the 15th day of November, 1862, which is more than fifty miles east of the most easterly part of the lands in contest, by filing its assent to the provisions of said act, under the seal of said company, in the Department of the Interior and made said navigable water at said point its "point of beginning," as in said act provided. We insert, therefore, that the act of Congress of July 2d, 1864, enlarging the said grant of July 1st, 1862, could only enlarge the right of said railroad company from the city of Sacramento to the easterly line of the State of California and no assignment from said Central Pacific Railroad Company to the contestants here having been offered in evidence in this case, and the right of said Central Pacific Railroad Company having been abandoned to all lands and other rights west of the said city of Sacramento, in the month of November, 1862, no assignment made subsequent to that date could convey any right whatever to said Western Pacific Railroad Company, nor does the act of Congress of March 3d, 1865, attempt to do so or to act retrospectively upon the previous abandonment of the said Central Pacific Railroad Company by reviving the same and infusing
436 life therein. We therefore respectfully insist that the de-

cision appealed from should be reversed and the lan- in contest awarded to the appellants in severalty, as claimed by them, upon the grounds—

1. That the decision appealed is contrary to the evidence and not in any manner sustained by it.

2. That said decision is contrary to law governing the rights of the parties to this contest and the evidence in this case.

III. That the evidence clearly and beyond any doubt shows that the lands in dispute and embraced within this appeal always were, up to the 23d day of June, 1871, a part of a duly confirmed private grant, to wit, "Las Pocitas."

IV. That the evidence shows there was no grant made of any lands to the contestant in this case by either of the acts of Congress of July 1st, 1862, or July 2d, 1864, and the Central Pacific Railroad Company having abandoned its right to all lands west of the city of Sacramento on or about the 15th day of November, 1862, and no assignment from said Central Pacific Railroad Company to said Western Pacific Railroad Company having been shown, the appellants are entitled to these lands. We shall only add that it will only prolong litigation to render an ill-considered decision awarding to the contestants these lands, for should such a course be pursued every one of the settlers fully know that they can go into courts of justice of both the State and the United States Supreme Court and litigate over what should unfortunately be denied them in the executive department of the Government. The appellants most respectfully say that they have contended for their rights to these lands since the month of April, 1867, and during that time have expended large sums of money to protect themselves from the
437 grasp of fraudulent land speculators; hence desire rest; but yet, if so it happens that their homes shall not be awarded to them on this appeal, they shall undoubtedly follow the spirit of Johnson *vs.* Towsley and Samson *vs.* Smiley with the same vigor and force as if this was the very earliest stage of the litigation. That we hope to avoid this necessity is most deeply entertained by all, and that the just rights of the appellants will be awarded to them by the honorable Secretary appealed to is most respectfully requested by appellants.

Respectfully, B. B. NEWMAN,
Attorney for Arthur St. Clair and Other Appellants.

San Francisco, July 2nd, 1873.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

COMPLAINANT'S EXHIBIT "J. J." S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 2, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of Department decision of Nov. 25, 1873, in the case of Arthur St. Clair *et al. vs.* Western Pacific Railroad Company is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] N. C. McFARLAND,
Commissioner of the General Land Office.

438 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *November* 25, 1873.

SIR: I have carefully examined the case of Arthur St. Clair *et al. vs.* The Western Pacific Railroad Company, involving title to lots 1 and 2, section 19, T. 3 S., R. 3 E., M. D. M., California, on appeal from your decision of May 3rd, 1873.

Agreeing with you both in your finding of facts and application of the law thereto, I affirm your decision and return herewith the papers transmitted with your letter of the 13th instant.

Very respectfully, C. DELANO, *Secretary.*

Hon. W. Drummond, Com'r Gen'l Land Office.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

439 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 2. S. C. H., Examiner.

Agreed Statement of Facts Relative to Lands in T'p 3 S., R. 3 E.

Circuit Court of the United States, Ninth Circuit, District of California.

UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CURTNER *et als.*, Defendants. } No. 3106.

An agreed statement of facts relative to the lands in controversy herein, situate in township 3 S., R. 3 E., Mt. Diablo meridian.

A I.

That on the 15th day of May, 1863, application was made by M. D. Townsend to the State locating agent for the purchase from the State of California of the N. W. ¼ of section 21, in said township, as an indemnity school selection under the act of Congress of March 3d, 1853.

II. That Tract Book No. 10 in the United States land office in San Francisco shows that the application of the locating agent to locate said land was made and entered therein by the register of said land office on the 22 day of May, 1863.

III. That the certificate of the State locating agent, bearing date June 25th, 1863, now on file in the State land office at Sacramento, declares that he located said land at the United States land office at San Francisco on the 22d day of May, 1863, and that he located the same as a portion of the school lands for the use of said M. D. Townsend.

IV. That on the 10th day of December, 1863, such location was approved by the surveyor general of the State of California, and on the 17th day of February, 1864, the register of the State land office issued to said Townsend a certificate of purchase, in due
440 form, for said land

V. That on the 29th day of November, 1871, the State, by its proper officers, issued its patent for said land to the grantees of said Townsend, and such title, if any, is now and at the commencement of this suit was held by the defendants, viz: "The Bank of California," Thomas W. Moore, Henry F. Crane, and Charles G. Johnston.

All the facts stated above in reference to the State title to said N. W. ¼ of sec. 21 are the same as the facts existing in reference to the State title to the S. W. ¼ of said section 21, with the sole exception that the name of the original purchaser was one A. B. Winegar.

B I.

On the 27th day of May, 1863, application was made by one George U. Dane to the State locating agent for the purchase from the State of California of the N. W. ¼, the N. ½ of the N. E. ¼, and the S. W. ¼ of the N. E. ¼ of sec. 19, in said township, containing in all 280 acres, and embraces the land described in complainant's bill as follows: N. E. ¼ of N. E. ¼, lot 4, the S. W. ¼ of N. E. ¼, lots 5, 1, & 7 of section 19, in said township.

II. That Tract Book No. 10 in the United States land office in San Francisco shows that the application of the locating agent to locate said land was made and entered therein by the register of said land office on the 25th day of June, 1863.

III. The certificate of the State locating agent, bearing date July 25th, 1863, now on file in the State land office at Sacramento, declares that he located said land at the U. S. land office at San Francisco on the 25th day of June, 1863, and that he located the
441 same as a portion of the school lands for the use of said George U. Dane.

IV. On the 10th of December, 1863, such location was approved by the surveyor general of the State of California, and on the 22d day of February, 1864, the register of the State land office issued to said George W. Dam a certificate of purchase in due form for said land.

On the 5th of April, 1873, the State, by its proper officers, issued its patent for said land to the grantee of said George W. Dam, and such title, if any, is now and was at the commencement of this suit held by the defendants, viz., fifty acres thereof by Henry F. Crane and the residue by Andrew S. Barron.

C I.

On the 20th day of April, 1864, application was made by one M. B. French to the State locating agent for the purchase by him from the State of California of the S. ½ of the S. W. ¼ and S. W. ¼ of S. E. ¼ of section 17; also the S. E. ¼ of the N. E. ¼ of sec. 19, in said township, containing 160 acres of land.

II. That Tract Book No. 10 in the United States land office in San Francisco shows that the application to locate said land by the locating agent was made and entered therein by the register of said land office on the 16th day of May, 1864.

III. The certificate of the State locating agent, bearing date May 26th, 1864, now on file in the State land office at Sacramento, declares that he located said land at the United States land office at San Francisco on the 16th day of May, 1864, and that he located the same as a portion of the school lands for the use of said M. B. French.

IV. On the 8th day of July, 1864, such location was approved by the surveyor general of the State of California, and on
442 the 12th day of August, 1865, said French made the first payment to the State for said land, and on the 9th of February,

1866, the register of the State land office issued to said M. B. French a certificate of purchase in due form for said land.

V. On the 29th day of November, 1871, the State of California, by its officers, issued its patent for said land to the grantees of said M. B. French, and such title, if any, is now and at the commencement of this suit was held as follows, viz: The S. ½ of S. W. ¼ and S. W. ¼ of S. E. ¼ of sec. 17 by the defendants Patrick and Margaret Armstrong; the S. E. ¼ of the N. E. ¼ by the defendant Franz Leberer.

That in each of the above applications—certificates of location and certificate of purchase—the lands are designated therein and treated as surveyed lands.

For the purposes of this suit the foregoing is admitted by the complainant and defendants to be a true statement of facts, subject to the objection by the complainant that such facts and each and all of them are irrelevant, immaterial, and incompetent upon any issue in said suit.

H. F. CRANE, *Solicitor for Defendants.*
S. G. HILBORN, *United States Attorney.*
SHAFTER, PARKER AND WATERMAN,
Of Counsel for Complainant.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

443 U. S. Circuit Court, Dist. of Cal.

U. S.
vs.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 3. S. C. H., Examiner.

Certificate of Purchase of N. W. ¼ Sec. 21, T'p 3 S., R. 3 E., Mt. D. Md.

Certificate of purchase.

State land office of the State of California.

No. 417. SACRAMENTO, *Seventeenth Day of February*, 1864.

It appearing from the certificate of the county treasurer, bearing date the 25th day of January, A. D. 1864, that M. D. Townsend has paid to the State of California the sum of $112.00 *dollars*, being twenty per cent. of the purchase-money and first year's interest on the balance in advance, for three hundred and twenty acres of State school lands, described as follows, in location No. 83, surveyed lands, San Francisco land district: N. W. ¼ of sec. 21 and N. E. ¼ of sec. 20, in township No. 3 south, range No. 3 east, Mt. Diablo meridian:

Now, therefore, be it known that the said M. D. Townsend, having made payment of said twenty per cent. — the first year's interest for the above-described tract of land under the provisions of an act amendatory of and supplimental to an act entitled "An act to provide for the location & sale of the unsold portion of the five hun-

dred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23d, 1858, and to the act amendatory thereof, approved February 18th, 1859, is the purchaser of the same, and after having in all other respects complied with the provisions of said act, and on presentation of this certificate to the Governor of the State of California, the said M. D. Townsend
444 shall be entitled to receive a patent for the same.

320 acres taken for 320 acres; balance of purchase-money due, 320.00 dollars; interest to be computed from June 25th, 1863.

(Endorsed in the margin on the face of the certificate, viz:)

"Grant of 16th and 36th sections, surveyed lands; price per acre, one $\frac{25}{100}$ dollars; act of April 22d, 1861; interest, ten per cent. per annum in advance."

In witness whereof the register of said land office has
[L. S.] hereto set his hand and affixed his seal of office the day and date above mentioned.

J. F. HOUGHTON,
Register State Land Office,
By A. S. BENDER, *Deputy.*

Endorsements on Same.

On the back of said certificate the following endorsements appear:

Received from M. D. Townsend thirty-two dollars, being payment of second year's interest on the within-described tract of land.

County treasurer's office, Alameda county, 19th day of May, 1864.

S. HUFF,
County Treasurer.

Received from M. D. Townsend thirty-two dollars, being payment of third year's interest on the within-described tract of land.

County treasurer's office, Alameda county, 6th day of May, 1865.

S. HUFF,
County Treasurer.

Received from M. D. Townsend one hundred and twelve & $\frac{45}{100}$ ($112.45) dollars, being payment of interest on the within tract of land to Jan'y 1st, 1870.

445 County treasurer's office, Alameda county, third day of March, 1869.

R. A. McCLURE,
County Treasurer.

Received from M. D. Townsend thirty-two ($32.00) dollars, being payment of interest on the within-described tract of land to Jan'y 1st, 1870.

County treasurer's office, Alameda county, 21st day of March, 1870.

R. A. McCLURE,
Co. Treasurer.

Received from M. D. Townsend thirty-two dollars, being payment of interest for the within-described tract of land to January 1st, 1872.

County treasurer's office, Alameda county, June 10th, 1871.

R. A. McCLURE,
County Tresurer.

Received Nov. 27, 1871, in full on the within, the sum of three hundred & twenty ($320) dollars.

R. A. McCLURE,
County Treasurer,
By C. E. PALMER, *Deputy.*

"The following words are written accross the face of the certificate:"

"Cancelled and patent issued."

(Endorsed:) Filed July 26th, 1887. L. S. B. Sawyer, clerk.

STATE LAND OFFICE, }
State of California, } *ss:*

I hereby certify that the foregoing is a copy of an original document now in my office; that said copy has been compared by me with the original, and is a correct transcript therefrom and of
446 the whole of such original; that the words "cancelled and patent issued" were endorsed afterwards when the patent was prepared.

In witness whereof I have hereunto set my hand and affixed my official seal this 29th day of October, A. D. 1883.

ROBERT GARDNER,
Register State Land Office.

447 U. S. Circuit Court, Dist. of Cal.

U. S. }
vs. } No. 3106.
CURTNER. }

RESPONDENT'S EXHIBIT 4. S. C. H., Examiner.

Certificate of Purchase for S. W. ¼ Sec. 21, T'p 3 S., R. 3, Mt. D. Md.

Certificate of purchase.

State land office of the State of California.

No. 436. SACRAMENTO, *9th Day of July,* 1864.

It appearing from the certificate of the county treasurer, bearing date the 16th of April, A. D. 1864, that A. B. Winegar has paid to

the State of California the sum of one hundred and twelve $\frac{00}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on the balance in advance, for three hundred and twenty acres of State school land, described as follows, in location No. 82, surveyed lands, San Francisco land district:

The southwest quarter of section No. 21 and the southeast quarter of section No. 20, in township No. 3 south, range No. 3 east, Mount Diablo meridian:

Now, therefore, be it known that the said A. B. Winegar, having made payment of said twenty per cent. and first year's interest for the above-described tract of land under the provisions of an act amendatory of and supplemental to an act entitled "An act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23rd, 1858, and to the act amendatory thereof, approved February 18th, 1859,"
448 is the purchaser of the same, and after having in all other respects complied with the provisions of said act, and on presentation of this certificate to the Governor of the State of California, the said A. B. Winegar shall be entitled to receive a patent for the same.

320 acres taken for 320 acres; balance of purchase-money due, 320.00 dollars; interest to be computed from June 25th, 1863.

(Endorsed in the margin on the face of the certificate, viz:)

"Grant of 16th and 36th sections, surveyed lands; price per acre, one $\frac{25}{100}$ dollars; act of April 22nd, 1861; interest, ten per cent. per annum in advance."

In witness whereof the register of said land office has
[L. S.] hereto set his hand and affixed his seal of office the day and date above mentioned.

J. F. HOUGHTON,
Register State Land Office,
By A. S. BENDER, *Deputy.*

Endorsements on Same.

Endorsed on the back of said certificate is, viz:

Received from A. B. Winegar thirty-two dollars, being payment of second year's interest on the within-described tract of land.

County treasurer's office, Alameda county, 11th day of July, 1864.

S. HUFF,
County Treasurer.

Received from A. B. Winegar thirty-two dollars, being payment of third year's interest on the within-described tract of land.

County treasurer's office, Alameda county, sixth day of May, 1865.

S. HUFF,
County Treasurer,
By J. W. JOSLYN, *Deputy.*

Received from A. B. Winegar one hundred and twelve $\frac{45}{100}$ dollars, being payment of interest on the within-described tract of land to Jan'y 1st, 1870.

449 County treasurer's office, Alameda county, third day of March, 1869.

R. A. McCLURE,
County Treasurer.

Received from A. B. Winegar thirty-two dollars, being payment of interest on the within-described tract of land to Jan'y 1st, 1871.
County treasurer's office, Alameda county, 21st day of March, 1870.

R. A. McCLURE,
County Treasurer.

Received from A. B. Winegar thirty-two dollars, being payment of interest on the within-described tract of land to Jan'y 1st, 1872.
County treasurer's office, Alameda county, 10th day of June, 1871.

R. A. McCLURE,
County Treas.,
By C. E. PALMER, *Deputy.*

$320. Rec'd, Nov. 27th, 1871, in full on the within, three hundred and twenty dollars.

R. A. McCLURE, *Treas.*,
By C. E. PALMER, *Deputy.*

(The following words are written across the face of the certificate :) "Cancelled and patent issued."

(Endorsed :) Filed July 26th, 1887. L. S. B. Sawyer, clerk.

(Certified the same as Exhibit 3.)

450 U. S. Circuit Court, Dist. of Cal.

U. S. *vs.* CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 5. S. C. H., Examiner.

Certificate of Purchase of Lands in Sec. 19, *T'p* 3 *S., R.* 3 *E., Mt. D. Md.*

Certificate of purchase.

State land office of the State of California.

No. 424. SACRAMENTO, 22*nd Day of February*, 1864.

It appearing from the certificate of the county treasurer, bearing date the 26th day of January, A. D. 1864, that George W. Dam has

paid to the State of California the sum of one hundred and twelve dollars, being twenty per cent. of the purchase-money and first year's interest on the balance in advance, for three hundred and twenty acres of State school land, described as follows, in location No. 120, surveyed lands, San Francisco land district: The N. W. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section No. 19, in township No. 3 south, range No. 3 east, Mount Diablo meridian:

Now, therefore, be it known that the said George W. Dam, having made payment of said twenty per cent. and first year's interest for the above-described tract of land under the provisions of an act amendatory of and supplemental to an act entitled "An act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23d, 1858, and to the act amendatory thereof, approved February 18th, 1859," is the purchaser of the same, and after having in all other respects complied
451 with the provisions of said act, and on presentation of this certificate to the Governor of the State of California, the said George W. Dam shall be entitled to receive a patent for the same.

$289\frac{19}{100}$ acres taken for 320 acres; balance of purchase-money due, $320.00 *dollars*; interest to be computed from July 25th, 1863.

(Endorsed in the margin on the face of the certificate, viz:)

"Grant of 16th and 36th sections; surveyed lands; price per acre, one $\frac{25}{100}$ dollars; act of April 22nd, 1861; interest, ten per cent. per annum in advance."

In witness whereof the register of said land office has hereto
[L.S.] set his hand and affixed his seal of office the day and date above mentioned.

J. F. HOUGHTON,
Register State Land Office,
By A. S. BENDER, *Deputy.*

(Endorsed on the back of this certificate is as follows:)

Received from George W. Dam thirty-two dollars ($32), being payment of second year's interest on the within-described tract of land.

County treasurer's office, Alameda county, 11th day of August, 1864.

S. HUFF,
County Treasurer.

Received from G. W. Dam one hundred & forty-four ($144.00) dollars, being payment of interest on the within-described tract of land to Jan'y 1st, 1870.

County treasurer's office, Alameda county, 24th day of April, 1869.

R. A. McCLURE,
County Treasurer.

452 Received from G. W. Dam ninety and $\frac{93}{100}$ dollars, being payment of fourth year's interest on the within-described tract of land.

County treasurer's office, Alameda county, 4th day of September, 1872.

R. S. FARRELLY,
County Treas.,
By C. E. PALMER, *Deputy.*

$328.62. Received from George W. Dam three hundred & twenty-eight and $\frac{62}{100}$ dollars, being payment in full of principal & interest on the within-described tract of land.

County treasurer's office, Alameda county, 4th day of April, 1873.

R. S. FARRELLY,
County Treasurer,
By C. E. PALMER, *Deputy.*

Marked on face: "Cancelled & patent issued."
(Certified same as Exhibit 3.)

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

453 U. S. Circuit Court, Dist. of Cal.

U. S.
vs.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 6. S. C. H., Examiner.

Certificate of Purchase of Lands in Secs. 17 *&* 19, *T'p* 3 *S., R.* 3 *E., Mt. D. Md.*

Certificate of purchase.

State land office of the State of California.

No. 584. SACRAMENTO, *the* 9*th Day of February*, 1866.

It appearing from the certificate of the county treasurer, bearing date the 12th of August, A. D. 1865, that M. B. French has paid to the State of California the sum of one hundred and twelve dollars, being twenty per cent. of the purchase-money and first year's interest on the balance in advance, for three hundred and twenty acres of State school land, described as follows, in location No. 225, surveyed lands, San Francisco land district: S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of sec. No. 17, N. W. $\frac{1}{4}$ of sec. No. 20, and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sec. No. 19, in township 3 south, range No. 3 east, Mount Diablo meridian:

Now, therefore, be it known that the said M. B. French, having made payment of said twenty per cent. and first year's interest for

the above-described tract of land under the provisions of an act amendatory of and supplimental to an act entitled "An act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23rd, 1858, and to the act amendatory thereof, approved February 18th, 1859, and the act of April 27th, 1863," is the purchaser of the same, and after having in all other respects complied with the provisions of said act, and on pre-
454 sentation of this certificate to the Governor of the State of California, the said M. B. French shall be entitled to receive a patent for the same.

320 acres taken for 320 acres; balance of purchase-money due, 320 dollars; interest to be computed from May 16th, 1864.

(Endorsed in the margin on the face of the certificate, viz:)

"Grant of 16th and 36th sections, surveyed lands; price per acre, one & $\frac{25}{100}$ dollars; act of April 22d, 1861, and act of April 27th, 1863; interest, ten per cent. per annum in advance."

In witness whereof the register of said land office has
[L. S.] hereto set his hand and affixed his seal of office the day and date above mentioned.

J. F. HOUGHTON,
Register State Land Office,
By A. S. BENDER, *Deputy.*

Endorsements on Same.

(Endorsed on the back of the certificate is the following:)

"Received from M. B. French one hundred & forty-seven & $\frac{92}{100}$ dollars, being payment of interest on the within-described tract of land to Jan'y 1st, 1870.

County treasurer's office, Alameda county, 3rd day of March, 1869.

R. H. McCLURE,
County Treasurer."

Received from M. B. French thirty-two dollars, being payment of interest on the within-described tract of land to Jan'y, 1871.

County treasurer's office, Alameda county, 21st day of March, 1870.

R. A. McCLURE,
County Treasurer.

Received from M. B. French thirty-two dollars, being payment of interest on the within tract of land to Jan'y 1st, 1872.
455 County treasurer's office, Alameda county, 10th day of June, 1871.

R. A. McCLURE,
County Treasurer.

Received from M. B. French three hundred & twenty dollars, being payment in full of principal & interest on the within-described tract of land.

County treasurer's office, Alameda county, 27th day of Nov., 1871.

R. A. McCLURE,
County Treasurer.

(The words "cancelled and patent issued" are written across the face of the certificate.)

(Endorsed:) Filed July 26th, 1887. L. S. B. Sawyer, clerk.

(Certified same as Exhibit 3.)

U. S.
v.
CURTNER.

RESPONDENT'S EXHIBIT "7." S. C. H., Examiner.

Acc't kept by State locating agent.

School Land Locations on Surveyed Lands.

No. of location.		For whom located.	Date of application.	Description of tracts.	Section.	Township.	Range.	Acres.	Aggregate.	Description of tracts.	Section.	Township.	Range.	Acres.	Aggregate.	Why relinquished.
			1863.													
109	109	State of California...	June 25	N. W. ¼ of W. ½ of N. E. ¼ " N. E. ¼ of N. E. ¼ "	19 " "	3 S. " "	3 E. " "	289.19	.....	N. ½ of.....	36	17 S.	11 E.	320	320	In a private grant.
156	156	" "	May 16	S. ½ of S. W. ¼ " S. W. ¼ of S. E. ¼ " N. W. ¼	17 " 20	" " "	" " "	80 40 160								
72	72	" "	May 22	S. E. ¼ of N. E. ¼ of S. W. ¼	19 "	" "	" "	40 160	320	E. ½ "	36	1 S.	4 E.	320	320	" " "
73	73	" "	" "	S. E. ¼ N. W. ¼ N. E. ¼	" 21 20	" " "	" " "	160 160 160	320	W. ½	36	4 S.	4 W.	320	320	" " "
			1865.							E. ½ "	16	4 "	2 E.	320	320	" " "
327	R. 570	" "	June 13	W. ½	"	2 S.	1 E.	320	320	S. ½ "	36	12 N.	29 W.	320	320	S. B. In a private grant.
303	R. 572	" "	" 12	N. E. ¼ S. E. ¼	" "	" "	" "	160 160	320	W. ½ "	36	10 N.	19 W.	320	320	S. B. " " "
302	R. 99	" "	" "	S. E. ¼ N. E. ¼	" "	" "	" "	160 160	320	E. ½ "	16	4 S.	1 E.	320	320	" " "

DEPARTMENT OF THE INTERIOR, UNITED STATES LAND OFFICE, SAN FRANCISCO, CAL., *September 8th*, 1886.

I hereby certify that the foregoing is a full, true, and correct copy of vol. 1 of Indemnity Selections on Surveyed Lands, now of record in this office, so far as the same pertains to the sections herein described.

A. C. BRADFORD, *Register*.

Filed July 26, 1887. L. S. B. SAWYER, *Clerk*.

458 U. S. Circuit Court, Dist. of Cal.

U. S. v. CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 10. S. C. H., Examiner.

Letter of Commissioner Showing Suspension of Lands in T'p 3 S., R. 3 E., Mt. D. Md.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June 30th*, 1870.

Register and receiver, San Francisco, California.

GENTLEMEN: I am in receipt of register's letter of 24th ultimo, submitting the application of Alonzo Flanigan to enter as a pre-emptor S. W. ¼ sec. 20, 3 S., 3 E., embraced in the original survey of Rancho Las Pocitas.

In reply I return the proof submitted, and have to advise you that said ranch claim is yet unadjusted.

You will therefore decline to receive any application whatever for tracts within the exterior boundaries until you shall receive formal notice from this office of the release of the lands from suspension. Please acknowledge receipt of this as "G" by date.

Very respectfully, JAS. S. WILSON,
Commissioner.

(Endorsed:) Filed July 11th, 1870.

Letter of Surv. Gen'l Showing Suspension of Lands in T'p 3 S., R. 3 E., Mt. D. Md.

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *29th of June*, 1869.

H. G. Rollins, Esq., register U. S. land office, San Francisco.

SIR: On the 3rd June, after the recent survey of the Rancho Los Pocitas, in Livermore Valley, I withdrew the suspension of secs. 30, township 3 south, range 3 east, and also of all of township 3 south, range 3 east, except the 6th and 7th sections. By a letter from the Comm'r of Gen'l Land Office, dated June 16th, I have information
459 that the Sec'y of the Interior has been applied to by the heirs of Livermore for a reconsideration of the decision of the Department of the 30th of July last in relation to the old survey of the Rancho Las Pocitas, and that 60 days from service of notice upon the adverse party has been allowed for filing in the Commissioner's office such briefs as they may think proper; meantime the Secretary orders a suspension of the decision of the 30th June last. This makes it necessory to rescind my action of 3rd June last, and to request that the following lands should be again suspended: Lot No. 37, in township 2 south, range 3 east, Mount Diablo Meridian.

This affects parts of sections 30 and 31 of that township. Also

must be suspended lot No. 37 of township 3 south, range 3 east, M. D. meridian, which includes all of section 7, 8, 17, 18, 19, 20, 29, 30, and the west half of section 6, the south half of the S. E. qr. of section 6, S. half of the S. half of section 5, west half of sec. 9, west half of section 16, west half of section 21, S. W. quarter of S. E. quarter of sec. 21, west half and west half of east half of sec. 28, north half of the north half of sec. 31, north half of the north half of sec. 32, north half of the northwest quarter of sec. 33, and the northwest quarter of the northeast quarter of section 33.

Yours very respectfully, SHERMAN DAY,
U. S. Surv. Gen'l for Cal.

460 *Letter of Com'r Removing Suspension, June 14th, 1871.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 14th*, 1871.

Register & receiver, San Francisco, Cal.

GENTLEMEN: For your information I have to state that the Secretary of the Interior has affirmed the decision of this office approving the survey of the Rancho "Las Pocitas," containing 8,880 acres.

Any lands outside of said survey heretofore held in suspension to await the final determination in the Pocitas case are therefore relieved from such suspension, and you are directed to deal with them as other public lands are dealt with.

Very respectfully, your ob't serv't,
WILLIS DRUMMOND,
Commissioner.

I hereby certify that the foregoing letters, viz., letter of Commissioner Wilson, of date June 30th, 1870; letter of Sherman Day, U. S. surveyor general, under date of June 29, 1869; letter of Willis Drummond, Commissioner, under date of June 14th, 1871, are true, full, and correct copies of the original letters now on file in this office and of every part thereof.

November 13, 1886.

W. LEIGH,
Receiver of U. S. Land Office at San Francisco, Cal.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

461 U. S. Circuit Court, Dist. of Cal.

U. S.
vs. } No. 3106.
CURTNER.

RESPONDENT'S EXHIBIT "11." S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *June 6th*, 1871.

SIR: I have considered the objections made to the survey of the

Rancho Las Pocitas, containing 8,880 acres, which was approved by you on the 1st March last, and, finding no valid reason for granting a new or further survey, I hereby affirm your action in the premises.

The papers in the case received with your letter of the 6th ultimo are herewith.

Very respectfully, your ob't serv't,

B. R. COWEN,
Acting Secretary.

The Commissioner of the Gen'l Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 7, 1871.

J. R. Hardenberg, Esq., U. S. surveyor general; San Francisco, Cal.

SIR: For you- information and guidance I enclose herewith a copy of the decision, dated 6th inst., of the Hon. Act'g Secretary of the Interior affirming the decision, dated 1st March last, of this office in the case of the survey of the Rancho "Las Pocitas" in California, containing 8,880 acres.

You will make the proper annotations upon the records of your office and relieve from suspension any lands outside of said survey heretofore held in suspension on account of this claim.

Please acknowledge the receipt of this letter.

Very respectfully, your ob't serv't,

WILLIS DRUMMOND,
Commissioner.

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DEPARTMENT OF THE INTERIOR,
U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL.

I, R. P. Hammond, Jr., U. S. surveyor general for the district of California, do hereby certify that I have carefully compared the foregoing and annexed copies of letters with those on file and of record in this office, and that the same are full, true, and correct copies.

Witness my hand and official seal this fifth (5) day of February, 1887.

[L. S.]

R. P. HAMMOND, JR.,
U. S. Surveyor General, Dist. of Cal.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

463 U. S. Circuit Court, Dist. of Cal.

U. S.
vs.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "12." S. C. H., Examiner.

Agreed Statement of Facts Relative to Lands in T'p 2 S., R. 1 E., Mt. D. Md.

Circuit Court of the United States, Ninth Circuit, District of California.

UNITED STATES OF AMERICA
vs.
HENRY CURTNER *et als.* } No. 3106.

An agreed statement of facts relative to land in controversy in this suit in township 2 S., R. 1 E., Mt. Diablo meridian.

A.

I. That the above-named township of lands was, by the surveyor general in and for the State of California, in the month of March, 1865, caused to be surveyed in the field, sectionized, and subdivided into sections and quarter sections; that such survey was constructed into a plat, and on the 6th day of April, 1865, the field-notes of such survey and the plat thereof were by him approved and placed in his office, where the same have since been and now remain; that a duplicate of said township plat was filed in the U. S. land office at San Francisco on the 10th day of June, 1865, and still remains in said office.

That said duplicate township plat, so filed in said land office, bears upon its face the following, in red ink: "The odd-numbered sections on this plat are granted to the Western Pacific railroad. See letter of instructed, dated Dec. 23d, 1864."

II. That on the 24th day of July, 1862, application was made by Thomas Murphy to the State locating agent for the purchase from the State of California of the east half of section 21, in said township; that said land was surveyed and platted by the surveyor of Contra Costa county, California.

III. That said State locating agent, on the 28th of July, 1862, certified, under a printed form, as follows: I have located
464 said land as a portion of the school lands for the use of said Thomas Murphy, and have made application to locate said land, in the name and for the benefit of the State of California, at the U. S. land office, but the register of said land office "refuses to recognize the same until the certified plats of the survey of said township shall be deposited in his office by the U. S. surveyor general."

IV. That such location was approved by the State surveyor general on the 29th day of December, 1862, and on the 11th day of July, 1863, the register of the State land office issued to said Thomas Murphy a certificate of purchase in due form for said land.

V. That Tract Book No. 11 in said U. S. land office shows that the application of said locating agent to locate said land was made and entered therein on the 12th day of June, 1865, by the register of said land office.

VI. That on the 3d day of February, 1871, the State patented said land to said Thomas Murphy, and such State title, if any, is now and was at the time this suit was commenced held by the defendant Henry Curtner.

B.

I. That on the 22nd day of July, 1862, application was made by Sam'l B. Martin to the State locating agent for the purchase from the State of the east half of section 13, in said township; that said land was surveyed and platted by the surveyor of Contra Costa county, California.

II. That said State locating agent, on the 25th of July, 1862, certified, under a printed form, as follows: I have located said
465 land as a portion of school lands for the use of said Sam'l B. Martin, and have made application to locate said land in the name and for the benefit of the State of California at the U. S. land office, but the register of said land office "refuses to recognize the same until the certified plats of the survey of said township shall be deposited in his office by the U. S. surveyor general."

III. That such location was approved by the State surveyor general on the 29th of December, 1862, and on the 2nd day of March, 1863, the register of the State land office issued to said Sam'l B. Martin a certificate of purchase in due form for said land.

IV. That Tract Book No. 11 in said United States land office shows that the application of said locating agent to locate said land was made and entered therein on the 12th day of June, 1865, by the register of said land office.

V. That on the 3d day of February, 1871, the State patented said land to said Sam'l B. Martin, and such title, if any, is now and was at the time this suit was commenced held by the defendant J. West Martin.

C.

I. That on the 10th day of March, 1863, application was made by J. B. Purdy to the State locating agent to purchase from the State of California the west half of section 15, in said township; that said land was surveyed and platted by the surveyor of Contra Costa county, California.

II. That on the 20th day of June, 1863, said State locating agent certified, under a printed form, as follows: I have located said land as a portion of the school for the use of said J. B. Purdy, and have made application to locate said land in the name and
466 for the benefit of the State of California at the U. S. land office, but the register of said land office "refuses to recognize the same until the certified plats of the survey of said township shall be deposited in his office by the U. S. surveyor general."

III. That such location was approved by the State surveyor gen-

eral on the 10th of September, 1863, and on the 25th day of January, 1864, the register of the State land office issued to said J. B. Purdy a certificate of purchase in due form for said land.

IV. That Tract Book No. 11 in the United States land office shows that the application by the locating agent to locate said land was made and entered therein on the 12th day of June, 1865, by the register of said land office.

V. That on the 4th day of March, 1878, the State patented said land to the grantee of said J. B. Purdy, and such State title, if any, is now and was at the commencement of this suit held by the defendant Henry Curtner.

D.

I. That on the 10th day of March, 1863, application was made by Marshall M. English to the State locating agent for the purchase from the State of the northeast quarter of section 15, in said township; that said land was surveyed and platted by the surveyor of Contra Costa county, California.

II. That said State locating agent, on the 20th day of June, 1863, certified under a printed form as follows: I have located said land as a portion of the school lands for the use of said Marshall M. English, and have made application to locate said land in the name and for the benefit of the State of California at the U. S. land office, but the register of said land office refuses to recognize the
467 same until the certified plats of the survey of said township shall be deposited in his office by the United States surveyor general.

III. That such location was approved by the State surveyor general on the 1st day of October, 1863, and on the 25th day of January, 1864, the register of the State land office issued to said Marshall M. English a certificate of purchase in due form for said land.

IV. That Tract Book No. 11 in said U. S. land office shows that the application by the locating agent to locate said land was made and entered therein on the 12th day of June, 1865, by the register of said land office.

V. That on the 9th day of November, 1870, said land was by the State patented to said Marshall M. English, and such title, if any, is now and was at the commencement of this suit held by the defendant Henry Curtner.

E.

I. That on the 12th day of March, 1863, application was made by A. J. Shrader to the State locating agent for the purchase from the State of California of the northeast quarter of section 33, in said township.

II. That on the 20th day of July, 1863, the said State locating agent certified under a printed form as follows: I have located said land as a portion of the school lands for the use of said A. J. Shrader, and have made application to locate said land at the U. S. land office in the name and for the benefit of the State of California, but the register of said land office "refuses to recognize the same until

the certified plats of the survey of said township shall be de-
468 posited in his office by the U. S. surveyor general."

III. The above location was approved by the State surveyor general on the 6th day of September, 1864, and said Shrader made his first payment for said land on the 14th day of March, 1865, and on the 1st day of July, 1869, the register of the State land office issued to said Shrader a certificate of purchase in due form for said land.

IV. That Tract Book No. 11 in the U. S. land office show- that the application by the locating agent to locate said land was made and entered therein on the 12th day of June, 1865, by the register of said land office.

V. That on the 9th of November, 1870, the State patented said land to said A. J. Shrader, and such State title, if any, is now and was at the commencement of this suit held by the defendant Rasmus H. Carstenson.

F.

I. On the 12th day of March, 1863, application was made by Sam'l Davis to the State locating agent for the purchase from the State of California of the west half of section 13, in said township.

II. That on the 20th day of July, 1863, the said State locating agent certified under a printed form as follows: I have located said land as a portion of the school lands for the use of said Sam'l Davis, and have made application to locate said land at the U. S. land office in the name and for the benefit of the State of California, but the register of said land office "refuses to recognize the same until the certified plats of the survey of said township shall be deposited in his office by the U. S. surveyor general."

469 III. That said location was approved by the State surveyor general on the 5th day of December, 1863; that on the 20th day of February, 1865, the said Sam'l Davis made the first payment on said purchase, and on the 31st day of March, 1870, the register of the State land office issued to him a certificate of purchase in due form for said land.

IV. That Tract Book No. 11 in said United States land office shows that the application by the locating agent to locate said land was made and entered therein on the 12th day of June, 1865, by the register of said land office.

V. That on the 6th day of April, 1871, the State patented said land to said Sam'l Davis, and such title, if any, is now and was at the commencement of this suit held by the defendant J. West Martin.

That in each of the above applications, certificates of location, and certificates of purchase the lands are designated therein and treated as unsurveyed lands.

G.

I. On the 22d day of September, 1865, application was made by F. O. Wakeman to the State locating agent for the purchas- from

the State of California of the south half of section 35, in said township.

II. On the 24th day of September, 1865, the said State locating agent certified that in pursuance of the act of April 27th, 1863, he had located said land as a portion of the school lands for the use of said F. O. Wakeman; that such location had been made by him by filing an application for the same in the U. S. land office, with the consent of the register of said land office.

III. That Tract Book No. 11 in the U. S. land office shows
470 that the only application to locate said land by the locating agent was made and entered therein on the 13th day of June, 1865, by the register of said land office.

IV. That such location was approved by the State surveyor general on the 26th day of November, 1870, and on the 9th day of December, 1870, the register of the State land office issued to said F. O. Wakeman a certificate of purchase in due form for said land.

That on the 18th day of May, 1872, the State patented said land to F. O. Wakeman, and such title, if any, was at the commencement of this suit held as follows, viz: an undivided half interest therein by Alfred E. Whitaker and the other half interest by George M. and Terrissa G. Taylor; that said George M. and Terrissa G. Taylor have since died, and their interest has become vested in their heirs-at-law, Anna T. Taylor, of lawful age, and George G. Taylor, an infant, aged twenty years.

H.

I. On the 22d day of September, 1865, application was made by C. F. Goodrich to the State locating agent for the purchase from the State of California of the north half of section 35, in said township.

II. That on the 25th day of September, 1865, the said State locating agent certified that in pursuance of the act of April 27th, 1863, he had located said land as a portion of the school lands for the use of said C. F. Goodrich; that such location had been made by him by filing an application for the same in the U. S. land office, with the consent of the register of said land office.

471 III. That Tract Book No. 11 in the U. S. land office shows that the only application to locate said land by the locating agent was made and entered therein on the 13th day of June, 1865, by the register of said land office.

IV. That such location was approved by the State surveyor general on the 26th day of November, 1870; that first payment was made on the 28th day of November, 1870, and on the 9th day of December, 1870, the register of the State land office issued to said C. F. Goodrich a certificate of purchase in due form for said land.

V. On the 18th day of May, 1872, the State patented said land to said C. F. Goodrich, and such title, if any, is now and was at the commencement of this suit held by the defendant John Hinkle.

For the purposes of this suit the foregoing is admitted by the complainant and defendants to be a true statement of facts, subject to the objection by the complainant that such facts and each and all of

them are irrelevant, immaterial, and incompetent upon any issue in said suit.

H. F. CRANE, *Solicitor for Defendants.*
S. G. HILBORN, *United States Attorney.*
SHAFTER, PARKER AND WATERMAN,
Of Counsel for Complainant.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

472 U. S. Circuit Court, Dist. of Cal.

U. S.
v. } No. 3106.
CURTNER.

RESPONDENT'S EXHIBIT "13." S. C. H., Examiner.

Certificate of Purchase.

State land office of the State of California.

No. 545. SACRAMENTO, 11*th Day July*, 1863.

It appearing from the certificate of the county treasurer, bearing date the 27th of June, 1863, that Thomas Murphy has paid to the State of California the sum of one hundred and twelve $\frac{00}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on the balance in advance, for three hundred and twenty acres of State school land, described as follows, in location No. 488 of unsurveyed lands, San Francisco land district: The east half of section No. 21, in township 2 south, range No. 1 east, Mt. Diablo merid-an:

Now, therefore, be it known that the said Thomas Murphy, having made payment of said twenty per cent. and first year's interest for the above-described tract of land under the provisions of an act entitled "An act amendatory of and supplemental to an act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23d, 1858, and to the act amendatory thereof, approved February 18th, 1859," is the purchaser of the same, and after full payment has been made, on presentation of the State register's certificate for a patent to the Governor of the State of California, the said Thomas Murphy or his assigns shall be entitled to receive a patent for the same.

320 acres taken for 320 acres; balance of purchase-money due, 320.00 dollars; interest to be computed from July 28th,
473 1862.

Grant of 16th and 36th sections, unsurveyed land; act of April 22nd, 1861; interest, ten per cent. per annum in advance; price per acre, one $\frac{25}{100}$ dollars.

In witness whereof the register of said land office has hereto set

his hand and affixed his seal of office the day and date above mentioned.

JOHN F. HOUGHTON,
Register State Land Office,
By A. S. BENDER, *Deputy.*

(Endorsed on back of certificate:)

Received from Thomas Murphy five hundred and fifty seven $\frac{57}{100}$ dollars, being payment in full of principal and interest for the within-described tract of land.

County treasurer's office, Sacramento county, 23d day of December, 1870.

H. SPINKS,
County Treasurer.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the foregoing is a copy of a document on file in my office, and that said copy has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed my official seal this 12th day of February, A. D. 1887.

THEO. REICHERT,
Register State Land Office,
By D. M. ANGEW, *Deputy.*

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

474 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "14." S. C. H., Examiner.

Certificate of Purchase.

State land office of the State of California.

No. 488. SACRAMENTO, 2 *Day of March,* 1863.

It appearing from the certificate of the county treasurer, bearing date 11th of February, A. D. 1863, that Samuel B. Martin has paid to the State of California the sum of one hundred and twelve $\frac{00}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on the balance in advance, for three hundred and twenty acres of State school land, described as follows, in location No. 484 of unsurveyed lands, San Francisco land district: E. $\frac{1}{2}$ of section 13, in township No. 2 south, range No. 1 east, Mount Diablo merid-an:

Now, therefore, be it known that the said Samuel B. Martin, having made payment of said twenty per cent. and first year's interest

for the above-described tract of land under the provisions of an act entitled "An act amendatory of and supplemental to an act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23d, 1858, and to the act amendatory thereof, approved February 18th, 1859," is the purchaser of the same, and after full payment has been made on presentation of the State register's certificate for a patent to the Governor of the State of California, the said Samuel B. Martin or his assigns shall be entitled to receive a patent for the same.

320 acres taken for 320 acres; balance of purchase-money due, 320.00 dollars; interest to be computed from July 25th, 1862.

475 Grant of 16th and 36 sections unsurveyed land; act of April 22d, 1861; interest, ten per cent. per annum in advance; price per acre, one $\frac{25}{100}$ dollars.

In witness whereof the register of said land office has hereto set his hand and affixed his seal of office the day and date above mentioned.

J. F. HOUGHTON,
Register State Land Office,
By A. S. BENDER, *Deputy.*

(Endorsed on back of certificate:)

Received from Samuel B. Martin fi*f*e hundred and fifty-seven $\frac{84}{100}$ dollars, being payment in full of principal and interest for the within-described tract of land.

County treasurer's office, Sacramento county, 23d day of December, 1870.

H. SPINKS,
County Treasurer.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the foregoing is a copy of a document on file in my office; that said copy has been compared by me with the original and is a correct transcript thereof and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed my official seal this 12th day of February, A. D. 1887.

[L. S.]

THEO. REICHERT,
Register State Land Office,
By D. M. ANGEW, *Deputy.*

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

476 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "15." S. C. H., Examiner.

Certificate of Purchase.

State land office of the State of California.

No. 616. SACRAMENTO, *the Twenty-fifth Day of January*, 1864.

It appearing from the certificate of the county treasurer, bearing date the 28th of December, A. D. 1863, that J. B. Purdy has paid to the State of California the sum of $112\frac{00}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on the balance in advance, for three hundred and twenty acres of State school land, described as follows, in location No. 612 of unsurveyed lands, San Francisco land district: The west half ($\frac{1}{2}$) section fifteen (15), in township No. 2 south, range No. 1 east, Mt. Diablo merid-an:

Now, therefore, be it known that said J. B. Purdy, having made payment of said twenty per cent. and first year's interest for the above-described tract of land under the provisions of an act entitled "An act amendatory of and supplemental to an act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23rd, 1858, and to the act amendatory thereof, approved February 18th, 1859," is the purchaser of the same, and after full payment has been made, on presentation of the *of the* State register's certificate for a patent to the Governor of the State of California, the said J. B. Purdy or his assigns shall be entitled to receive a patent for the same.

320 acres taken for 320 acres; balance of purchase-money due, $320\frac{00}{100}$ dollars; interest to be computed from June 20th, 1863.

477 Grant of 16th and 36th sections, unsurveyed lands; act of April 22d, 1861; interest, ten per cent. per annum in advance; price per acre, one $\frac{25}{100}$ dollars.

In witness whereof the register of said land office has hereto set his hand and affixed his seal of office the day and date above mentioned.

[L. S.] J. F. HOUGHTON,
Register State Land Office,
By A. S. BENDER, *Deputy.*

(Endorsed on back of certificate:)

Received from J. B. Purdy, 5 years 5 months 10 days from June 20th, 1863, to Jan'y 1st, 1869, $176.86, being payment of 5, 6, 10 interest on the within-described tract of land, one hundred 76 dollars $\frac{86}{100}$.

County treasurer's office, Contra Costa county, 27th day of October, 1870.

J. R. L. SMITH,
County Treasurer.

Received from J. B. Purdy, by S. B. Maskio, four hundred and fifty-eight $\frac{17}{100}$ dollars, being payment in full of principal and interest for the within-described tract of land.

County treasurer's office, Contra Costa county, 6th day of May, 1874.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the foregoing is a copy of a document on file in my office; that said copy has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed my official seal this 12th day of February, A. D. 1887.

THEO. REICHERT,
Register State Land Office,
By D. M. ANGEW, *Deputy.*

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

478 U. S. Circuit Court, Dist. of Cal.

U. S. *vs.* CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 16. S. C. H., Examiner.

Certificate of Purchase.

State land office of the State of California.

No. 618. SACRAMENTO, *the Twenty-fifth Day of January*, 1864.

It appearing from the certificate of the county treasurer, bearing date the 28th day of December, A. D. 1863, that Marshall M. English has paid to the State of California the sum of $112\frac{00}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on balance in advance, for three hundred and twenty acres of State school land, described as follows, in location No. 614 of unsurveyed lands, San Francisco land district: The northeast quarter of section fifteen (15) and southeast quarter of section ten (10), in township 2 south, range No. 1 east, Mt. Diablo meridian:

Now, therefore, be it known that the said Marshall M. English, having made payment of said twenty per cent. and first year's interest for the above-described tract of land under the provisions of an act entitled "An act amendatory of and supplemental to an act

to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23d, 1858, and an act amendatory thereof, approved February 18th, 1859," is the purchaser of the same, and after full payment has been made, on presentation of the State register's certificate for a patent to the Governor of the State of California, the said Marshall M. English or his assigns shall be entitled to receive a patent for the same.

479 $319\frac{58}{100}$ acres taken for 320 acres; balance of purchase-money due, $320\frac{00}{100}$ dollars; interest to be computed from June 20th, 1863.

Grant of 16th and 36th sections, unsurveyed lands; act of April 22d, 1861; interest, ten per cent. per annum in advance; price per acre, one $\frac{25}{100}$ dollars.

In witness whereof the register of said land office has hereto set his hand and affixed his seal the day and date above mentioned.

JOHN F. HOUGHTON,
Register State Land Office.
By A. S. BENDER. *Deputy.*

(Endorsed on back of certificate:)

Received from Marshall M. English five hundred and seventy-two $\frac{87}{100}$ dollars, being payment in full of principal and interest for the with— described tract of land.

County treasurer's office, Sacramento county, 22d day of October, 1870.

H. SPINKS,
County Treasurer.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the foregoing is a copy of a document on file in my office; that said copy has been compared by me with the original, and is a correct transcript therefrom and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed my official seal this 12th day of February, A. D. 1887.

[L. S.]

THEO. REICHERT,
Register State Land Office,
By D. M. ANGEW, *Deputy.*

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

480 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "17." S. C. H., Examiner.

Certificate of Purchase.

State land office of the State of California.

No. 868. SACRAMENTO, 1*st Day of July*, 1869.

It appearing from the certificate of the county treasurer, bearing date the 14th March, A. D. 1865, that A. J. Shrader has paid to the State of California the sum of fifty-six $\frac{}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on balance in advance, for one hundred and sixty acres of State school land, described as follows, in location No. 850 of unsurveyed lands, San Francisco land district: Northeast quarter of section thirty-three (33), in township No. 2 south, range No. 1 east, Mount Diablo meridian:

Now, therefore, be it known that the said A. J. Shrader, having made payment of said twenty per cent. and first year's interest for the above-described tract of land under the provisions of an act entitled "An act amendatory of and supplemental to an act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23d, 1858, and to the act amendatory thereof, approved February 18th, 1859," is the purchaser of the same; and after full payment has been made, on presentation of the State register's certificate for a patent to the Governor of the State of California, the said A. J. Shrader or his assigns shall be entitled to receive a patent for the same.

481 160 acres taken for 160 acres; balance of purchase-money due, 160.00 dollars; interest to be computed from July 20th, 1863.

Grant of 16th and 36th sections, unsurveyed lands; act of April 22d, 1861; interest, ten per cent. per annum in advance; price per acre, one $\frac{25}{100}$ dollars.

In witness whereof the register of said land office has hereto set his hand and affixed his seal of office the day and year above mentioned.

JOHN W. BOST,
Register State Land Office.

(Endorsed on back of certificate:)

Received from A. J. Shrader two hundred and fifty-nine $\frac{11}{100}$ dollars, being payment in full of principal and interest for the within-described tract of land.

County treasurer's office, Sacramento county, 30th day of September, 1870.

H. SPINKS,
County Treasurer.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the foregoing is a copy of a document on file in my office; that said copy has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed my official seal this 12th day of February, A. D. 1887.

THEO. REICHART,
Register State Land Office,
By D. M. ANGEW, *Deputy.*

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

482 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "18." S. C. H., Examiner.

Certificate of Purchase.

State land office of the State of California.

No. 875. SACRAMENTO, 31*st Day of March*, 1870.

It appearing from the certificate of the county treasurer, bearing date the 20th February, A. D. 1865, that Samuel Davis has paid to the State of California the sum of one hundred twelve $\frac{00}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on the balance in advance, for three hundred and twenty acres of State school land, described as follows, in location No. 844 of unsurveyed lands, San Francisco land district:

The west half of section thirteen (13), in township No. 2 south, range No. 1 east, Mount Diablo meridian:

Now, therefore, be it known that the said Samuel Davis, having made payment of said twenty per cent. and first year's interest for the above-described tract of land under the provisions of an act entitled "An act amendatory of and supplemental to an act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23d, 1858, and to the act amenda-

tory thereof, approved February 18th, 1859," is the purchaser of the same, and after full payment has been made, on presentation of the State register's certificate for a patent to the Governor of the State of California, the said Samuel Davis or his assigns shall be entitled to receive a patent for the same.

483 320 acres taken for 320 acres; balance of purchase-money due, 320.00 dollars; interest to be computed from July 20th, 1863.

Grant of 16th and 36th sections, unsurveyed lands; act of April 22d, 1861; interest, ten per cent. per annum in advance; price per acre, one $\frac{25}{100}$ dollars.

In witness whereof the register of said land office has hereto set his hand and affixed his seal of office the day and year above mentioned.

J. W. BOST,
Register State Land Office,
Per E. TWITCHELL, *Deputy.*

(End. on back of certificate:)

Received from Samuel Davis 5 years 5 months 10 days interest from July 20th, 1863, to Jan'y 1st, 1869, one hundred and seventy-four $\frac{20}{100}$ dollars, being payment of 5, 5, 10 interest on the within-described tract of land.

County treasurer's office, Contra Costa county.

JOHN R. L. SMITH.

Received from Samuel Davis three and sixty $\frac{43}{100}$ dollars, being payment in full of principal and interest for the within-described tract of land.

County treasurer's office, Sacramento county, 3d day of April, 1871.

H. SPINKS,
County Treasurer.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the foregoing is a copy of a document on file in my office; that said copy has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

In witness whereof I have hereunto set my hand and
484 affixed my official seal this 12th day of February, A. D. 1887.

THEO. REICHERT,
Register State Land Office,
By D. M. ANGEW, *Deputy.*

Filed July 26, '87.

L. S. B. SAWYER, *Clerk.*

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 19. S. C. H., Examiner.

Certificate of Purchase.

State land office of the State of California.

No. 3861. SACRAMENTO, *9th Day of December*, 1870.

It appearing from the certificate of the county treasurer, bearing date the 28th November, A. D. 1870, that C. F. Goodrich has paid to the State of California the sum of eighty-three $\frac{10}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on the balance in advance, for three hundred & twenty acres of State school land, described as follows, in location No. 320, surveyed lands, San Francisco land district: The north half of section thirty-five (35), in township No. 2, range No. 1 east, Mount Diablo merid-an:

Now, therefore, be it known that C. F. Goodrich, having made payment of said twenty per cent. and first year's interest for the above-described tract of land, is the purchaser of the same, and after having in all other respects complied with the requirements of the laws providing for the sale of said lands and the same have been confirmed to the State, and on surrendering this certificate to the State of California, the said C. F. Goodrich shall be entitled to receive a patent for the same.

320 acres taken for 320 acres; balance of purchase-money
485 due, 320 dollars; interest to be computed from Nov. 26th, 1870.

Grant of 16th and 36th sections, surveyed lands; price per acre, one $\frac{25}{100}$ dollars.

In witness whereof the register of said land office has hereto set his hand and affixed his seal of office the day and date above mentioned.

[L. S.] J. W. BOST,
Register State Land Office,
Per E. TWITCHELL. *Dep'y.*

(Endorsed on back of certificate:)

Received from C. F. Goodrich three hundred and forty-nine $\frac{69}{100}$ dollars, being payment in full of principal and interest for the within-described tract of land.

County treasurer's office, Sacramento county, 4th day of December, 1871.

A. SPINKS,
County Treasurer.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the foregoing is a copy of a document on file in my office; that said copy has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed my official seal this 2d day of March, A. D. 1874.

ROBERT GARDNER,
Register State Land Office.

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

486 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 20. S. C. H., Examiner.

Certificate of Purchase.

State Land Office of the State of California.

No. 3862. SACRAMENTO, *9th day of December*, 1870.

It appearing from the certificate of the county treasurer, bearing date the 28th of November, A. D. 1870, that F. O. Wakeman has paid to the State of California the sum of eighty-three $\frac{10}{100}$ dollars, being twenty per cent. of the purchase-money and first year's interest on the balance, in advance, for three hundred & twenty acres of State school land, described as follows, in location No. 325, surveyed lands, San Francisco land district: The south half of section thirty-five (35), in township No. 2 south, range No. 1 east, Mount Diablo meridian:

Now therefore be it known that the said F. O. Wakeman, having made payment of said twenty per cent. and first year's interest for the above-described tract of land, is the purchaser of the same; and after having in all other respects complied with the requirements of the laws providing for the sale of said lands and the same have been confirmed to the State, and on surrendering this certificate to the State of California, the said F. O. Wakeman shall be entitled to receive a patent for the same.

320 acres taken for 320 acres. Balance of purchase-money due, 320 dollars; interest to be computed from Nov. 26th, 1870.

Grant of 16th and 36th sections, surveyed lands. Price per acre, one $\frac{25}{100}$ dollars.

487 In witness whereof the register of said land office has hereto set his hand and affixed his seal of office the day and date above mentioned.

[L. S.]

J. W. BOST,
Register State Land Office,
Per E. TWITCHELL, *Dep'y.*

(Endorsed on back of certificate:)

Received from F. O. Wakeman three hundred and forty-nine $\frac{69}{100}$ dollars, being payment in full of principal and interest for the within-described tract of land.

County treasurer's office, Sacramento county, 4th day of December, 1871.

A. SPINKS,
County Treasurer.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the foregoing is a copy of a document on file in my office; that said copy has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed my official seal this 2d day of March, A. D. 1874.

[L. S.]

ROBERT GARDNER,
Register State Land Office.

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

Examiner.

Land Office.

strict of ——.

Part of	chaser.	Date of sale.	Number of receipt and certificate of purchase.	To whom patented.
E. ½	6 & 36	June 12, 1865	333	App'd Sept. 8, '70—list 18.
W. ½	6 & 36	June 12, 1865	301	App'd Mar. 11, 1871—list 20.
N. E. ¼	6 & 36	June 12, 1865	303	App'd Sept. 8, '70—list 18.
S. E. ¼		Pat. Feb'y 28, 1874	List 10	
W. ½	6 & 36	June 12, 1865	327	App'd Mar. 11, 1871—list 20.
E. ½ of		Feb'y 8, 1883	8708	Patented July 5, 1883.
E. ½	6 & 36	July 12, 1865	299	App'd Sept. 8, '70—list 18.
N. E. ¼	6 & 36	June 12, 1865	282	App'd Sept. 8, '70—list 18.
Lots 3 &		Pat. Feb'y 28, 1874	List 10	
N. ½	6 & 36	June 12, 1865	305	App'd Sept. 8, '70—list 18.
S. ½	6 & 36	June 12, 1865	310	App'd Sept. 8, '70—list 18.

DEPARTMENT OF THE INTERIOR,
NITED STATES LAND OFFICE, SAN FRANCISCO, CAL., *February* 5, 1887.

I ce No. 1 east, M. D. M., of records of this office so far as the same pertains to sections 13

A. C. BRADFORD, *Register*.

(E

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "21." S. C. H., Examiner.

Account of State locating ag't.

School Land Locations on Surveyed Lands.

No. of location.		For whom located.	Date of application.	Description of tracts.	Section.	Township.	Range.	Acres.	Aggregate.	Taken in lieu of— Description of tracts.	Section.	Township.	Range.	Acres.	Aggregate.	Why relinquished.
			1865.													
301	R. 89	State of California...	June 12th	W. ½ of.....	13	2 S.	1 E.	320	320	W. ½ of	36	3 S.	2 W.	320	320	In a private grant.
333	R. 499	" " " ...	" 13th	E. ½ "	13	"	"	320	320	E. ½ "	16	22 "	6 E.	320	320	" " "
299	R. 453	" " " ...	" 12th	E. ½ "	21	"	"	320	320	S. ½	16	23 "	7 E.	320	320	" " "
305	R. 92	" " " ...	" 13th	N. ½ "	35	"	"	320	320	E. ½ of	"	3 "	2 W.	320	330	" " "
310	R. 98	" " " ...	" "	S. ½ "	35	"	"	320	320	W. ½ "	16	4 "	1 E.	320	320	" " "
327	R. 570	" " " ...	" "	W. ½	15	"	"	320	320	S. ½ "	36	12 N.	29 W.	320	320	S. B. In a private grant.
303	R. 572	" " " ...	" 12	N. E. ¼.....	15	"	"	160	160	E. ½ "	16	4 S.	1 E.	320	320	" " "
302	R. 99	" " " ...	" "	N. E. ¼.....	33	"	"	160	160	"	"	"	" "	"	"	" " "

DEPARTMENT OF THE INTERIOR, UNITED STATES LAND OFFICE, SAN FRANCISCO, CAL., *September* 8, 1886.

I hereby certify that the foregoing is a full true, and correct copy of vol. I of Indemnity Selections on Surveyed Lands, now of record in this office, so far as the same pertains to the selections herein described.

A. C. BRADFORD, *Register.*

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

490 RESPONDENT'S EXHIBIT 23.

Juan B. Alvarado, Gobernador interino del Departamento de las Californias:

Por cuanto D'n José Noriega y Don Roberto Livermot hau pretendido para sus beneficios personales y el de sus familias, el parage conveido con el nombre de Las Positas, colindante con las orillas de las Lomitas de las Pocitas que están en el Sausal de la Agua, hasta con la Sierra de Buenos Ayres, y las lomas de las Cuevas, practicadas previamente las diligencios, y averiguaciones concervientes, segun lo dispuesto por las leyes y reglamentos usando de las facultades que me son conferidos; a nombre de la Nacion Mejicana he venido en concederles el parage mencionado, de clarandoles la propiedad de él por las presentes letras, entendiendose dicha concesion con entera conformidad á lo dispuesto por las leyes á reserva de la Ex'ma Junta Departamental del Supremo Gobierno, y bajo los condiciones siguientes.

1*a*. Podrán cercarlo sin perjudican las travecias, caminos ni cervidumbres; lo disfrutarán libre y esclusivamente destinan-
491 dolo al uso ó cultivo que mas les açomode; pero dentro de un año fabricarán casa, y estará habitada.

2*a*. Cuando se las confirme la propiedad solicitaran del Juez respectivo que les de posesion juridica en virtud de este despacho por el cual se demarcarán los linderos á cuyos limites pondrán á mas de las mojoneras algunos arboles frutales ó silvestres de alguna utilidad.

3*a*. El terreno que se les hace donacion es de dos leguas poco mas á menos segun esplica el diseño, que corre en el espediente con sus limites respectivos; el Juez que diere la posesion lo hará medir conforme á ordenanza, para señalan los linderos, quedando el sobrante que resulte á la nacion para los usos convenientes.

4*a*. Sé contravinieren á estos condiciones perderán su derecho al terreno, y será denunciable por otro.

En consecuencia mando que sirviendoles de titulo el presente, y teniendose por firme y valedero, se tome razon en el libro á que corresponde, y se entregue á los interesados para su resguardo,
492 y demas fines. Dado en Monterey á diez de Abril de mil ochocientos treinta y nueve.

JUAN B. ALVARADO. (RUBRICA.)

MAN'L JIMENO,
S'rio del Despacho. (RUBRICA.)

Queda tomado razon en el Libro respectivo á fojas segunda y para que conste lo firmo.

MANUEL JIMENO. (RUBRICA.)

El Ex'mo S. Gobernador ha dispuerto se tome razon de este titulo en la Prefectura del primer Distrito.

JIMENO. (RUBRICA.)

490 RESPONDENT'S EXHIBIT 23.

Juan B. Alvarado, Gobernador interino del Departamento de las Californias:

Por cuanto D'n José Noriega y Don Roberto Livermot han pretendido para sus beneficios personales y el de sus familias, el parage conveido con el nombre de Las Positas, colindante con las orillas de las Lomitas de las Pocitas que están en el Sausal de la Agua, hasta con la Sierra de Buenos Ayres, y las lomas de las Cuevas, practicadas previamente las diligencios, y averiguaciones concervientes, segun lo dispuesto por las leyes y reglamentos usando de las facultades que me son conferidos; a nombre de la Nacion Mejicana he venido en concederles el parage mencionado, de clarandoles la propiedad de él por las presentes letras, entendiendose dicha concesion con entera conformidad á lo dispuesto por las leyes á reserva de la Ex'ma Junta Departamental del Supremo Gobierno, y bajo los condiciones siguientes.

1a. Podrán cercarlo sin perjudican las travecias, caminos ni cervidumbres; lo disfrutarán libre y esclusivamente destinan-
491 dolo al uso ó cultivo que mas les acomode; pero dentro de un año fabricarán casa, y estará habitada.

2a. Cuando se las confirme la propiedad solicitaran del Juez respectivo que les de posesion juridica en virtud de este despacho por el cual se demarcarán los linderos á cuyos limites pondrán á mas de las mojoneras algunos arboles frutales ó silvestres de alguna utilidad.

3a. El terreno que se les hace donacion es de dos leguas poco mas á menos segun esplica el diseño, que corre en el espediente con sus limites respectivos; el Juez que diere la posesion lo hará medir conforme á ordenanza, para señalan los linderos, quedando el sobrante que resulte á la nacion para los usos convenientes.

4a. Sé contravinieren á estos condiciones perderán su derecho al terreno, y será denunciable por otro.

En consecuencia mando que sirviendoles de titulo el presente, y teniendose por firme y valedero, se tome razon en el libro á que corresponde, y se entregue á los interesados para su resguardo,
492 y demas fines. Dado en Monterey á diez de Abril de mil ochocientos treinta y nueve.

JUAN B. ALVARADO. (RUBRICA.)

MAN'L JIMENO,
S'rio del Despacho. (RUBRICA.)

Queda tomado razon en el Libro respectivo á fojas segunda y para que conste lo firmo.

MANUEL JIMENO. (RUBRICA.)

El Ex'mo S. Gobernador ha dispuerto se tome razon de este titulo en la Prefectura del primer Distrito.

JIMENO. (RUBRICA.)

Queda tomado razon á fojos 6 y señalodo con el numero 11 del libro correspondiente; que obra en el archivo de la S'rio del primer distrito.

JOSÉ M'A CEVARRUBIAS. (RUBRICA.)

493 (Vignette.)

OFFICE OF THE SURVEYOR GENERAL OF THE UNITED STATES FOR CALIFORNIA.

I, R. P. Hammond, Jr., surveyor general of the United States for the State of California, and as such having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican territory or department of Upper California, as also the papers of the late board of commissioners to ascertain and settle the private land claims in California, by virtue of the power vested in me by law do hereby certify that the 3 preceding and hereunto annexed pages of tracing paper, numbered from one to three, inclusive, exhibit a true, full, and correct copy of the original grant filed in case No. 77, Jose Noriega and Robert Libermore, Las Pocitas, as the same appears designated on the docket of the -foresaid board of commissioners, with no endorsement, and now on file in this office and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom and of the whole of such original.

In testimony whereof I have hereunto signed my name
[SEAL.] officially and caused my seal of office to be affixed, at the city of San Francisco, this 17th day of November, 1886.

R. P. HAMMOND, JR.,
U. S. Surveyor General for California.

(Here follows diagram marked p. 494.)

494½ (Vignette.)

OFFICE OF THE SURVEYOR GENERAL OF THE UNITED STATES FOR CALIFORNIA.

I, R. P. Hammond, Jr., surveyor general of the United States for the State of California, and as such having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican territory or department of Upper California, as also the papers of the late board of commissioners to ascertain and settle the private land claims in California, by virtue of the power vested in me by law do hereby certify that the preceding and hereunto annexed page of tracing paper, numbered H H No. 3, exhibit a true, full, and correct copy of the original diseño or map of Las Pocitas rancho filed in case No. 77, José Noriega and Robert Livermore, Las Pocitas C map, as the same is designated on the docket of the -foresaid board of commissioners and now on file in this office and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom and of the whole of such original.

495 In testimony whereof I have hereunto signed my name officially and caused my seal of office to be affixed, at the
[SEAL.] city of San Francisco, this 18th day of November, 1886.

R. P. HAMMOND, JR.,
U. S. Surveyor General for California.

(Endorsed:) U. S. circuit court, dist. of Cal. U. S. *vs.* Curtner. No. 3106. Respondent's Exhibit 23. S. C. Houghton, examiner. Filed July 26, 1887. L. S. B. Sawyer, clerk.

496 First stamp, six dollars.

U. S. Circuit Court, Dist. of Cal.

U. S. *v.* CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "24." S. C. H., Examiner.

Provissionally authorized by the maritime custom-house of Monterey for the years 1839 & 1840.

(Signed) ANTONIO M'A OSIO,
Constitutional Governor of the Department of the Californias.

(Signed) ALVARADO.
JUAN B. ALVARADO.

[Seal Maritime Custom-House of Monterey.]

Grant of Las Pocitas to Jose Noriega & Rob't Livermore.

Whereas Don Jose Noriega and Don Roberto Livermore have petitioned, for their own benefit and that of their families, the place known by the name of "Las Pocitas," bounded by the borders of the hillocks of Las Pocitas, which *which* are in the willow grove de la Agua, as far as the mountain range of Buenos Ayres and the hills of "Las Cuevas," having previously complied with the requirements and investigations in the matter: Now, in the exercise of the authority in me vested, in the name of the Mexican nation, I have thought proper to grant them said place, declaring the same to be their property by this letter patent. Said concession is understood to be in entire conformity with the laws, subject to the approval of the exc't departmenta board of the supreme Government and under the following conditions:

1. They may fence it, without obstructing cross-ways, roads, and servitudes. They shall enjoy it freely and exclusively, appropriating it to the use or culture they may deem fit, but within a year they will build a house, which they will cause to be inhabited.

2. When the property shall be confirmed to them they shall solicit the respective judge to give them judicial possession by virtue of this patent, by whom the boundaries shall be marked, at the
497 limits of which, besides the landmark, he shall set some fruit trees or else wild ones of some usefulness.

3. The land of which donation is made is of two leagues, little more or less, as the diseño annexed to the proceedings, with its respective limits, explains. The judge who shall give possession will cause the same to be measured agreeably to ordinance in marking the boundaries, leaving the excess (sobrante) which may result to the nation for such uses as may be deemed convenient.

4. If they shall contravene to these conditions they shall lose their right to said land, which may be denounced by any other person. I therefore command that, holding these presents to be a firm and valid title, the same be entered in the proper book and be returned to the interested parties for their own security and other purposes.

Given in Monterey, April 10th, 1839.

(Signed) JUAN B. ALVARADO.
MAN'L JIMENO,
Secretary of State.

The same was entered in the respective book in folio 2.
In witness whereof I sign my name.

JIMENO.

His exc'y the Governor has directed that this title be entered in the prefecture of the 1st district.

JIMENO.

In obedience to the supreme decree, which precedes, let it be entered.

CASTRO.

This title was entered in the proper book on the reverse of folio 1st.

Prefecture of the 1st district in San Juan de Castro, April 4th, 1841.

MAN'L CASTANARES, *Sec't'y.*
498 JUAN B. ALVARADO,
Constitutional Governor of the Department of the Californias.

The exc't departmental board, in their session on the 22d of May ult., approved the concession made by this Government on the 10th of April, 1839, of the land known by the name of "Las Pocitas del Valle de San Jose" to Don Jose Noriega and Don Roberto Livermort in the following terms:

The concession made by his honor the Governor of the place called "Las Pocitas" del Valle to Messrs. Jose Noriega & Roberto Livermort is hereby approved; and, in conformity with this day's decree, annexed to the respective proceedings, the present is issued to the parties, Don Jose Noriega & Don Roberto Livermort, in confirmation of the above-mentioned grant.

Monterey, June 10th, 1840.

(Signed) ALVARADO.
MAN'L JIMENO, *Sec't'y.*

The undersigned, secretary to the exc't departmental board of the Californias—

Do certify that the diseño of the parcel of land called "Las Pocitas del Valle de San Jose," containing two leagues (sitios de ganado major), little more or less, according to the preceeding sketch, is drawn exactly from the original annexed to the respective proceedings approved by the excellent board on the 22d day of May of the present year, and that it be evident wherever it may be deemed convenient I give these presents in Monterey this 10th day of June, 1840.

JOSE Z. FERNANDEZ.

(Endorsed:) Filed in office Feb'y 27th, 1852. Geo. Fisher, sec't'y.

499 I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of pages 12, 13, 14, "transcript" of the board of land commissioners in the case of Jose Noriega & Rob't Livermore as the same appears on file & of record in my office.

[L. S.] Attest my hand and seal of said district court this 10th day of November, A. D. 1886.

SOUTHARD HOFFMAN, *Clerk.*

To the board of commissioners for ascertaining and settling private land claims in the State of California:

Your petitioners, Jose Noriega & Robert Livermore, of the State of California, respectfully represent to your honorable board that they claim a certain tract of land called Las Pocitas, containing two leagues, more or less, situated in the county of ——, in said State of California; that they claim the same in fee by virtue of a grant made to themselves under the authority of the Mexican Government, by Juan B. Alvarado, governor of the department of the Californias, bearing date the 10th day of April, 1839, and approved by the territorial deputation on the 22d day of May, 1840.

Your petitioners present herewith their original grant of said land in the Spanish language, together with a translation of the same, & will make further proof of title, if required by the board. Your petitioners pray your honorable board to take into consideration their claim to said tract of land & decree their title to be valid and confirm the same.

And your petitioners will ever pray.

500 San Francisco, February 27th, 1852.

Filed in office Feb'y 27th, 1852.

GEO. FISHER, *Sect'y.*

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, & correct copy of petition of Jose Noriega & Rob't Livermore for the place called "Las Pocitas" as the same appears in the transcript of the board of land commissioners now on file and of record in this office.

Attest my hand and seal of said district court this 10th
[L. S.] day of November, A. D. 1886.
SOUTHARD HOFFMAN, *Clerk.*

Decree of Confirmation of Board of Land Commissioners.

JOSE NORIEGA and ROBERT LIVERMORE
vs.
THE UNITED STATES.
} Decree of Confirmation.

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of said petitioners is valid, and it is therefore decreed that the same be confirmed. The lands of which confirmation are hereby made, of Las Pocitas, are bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less.

Reference for further description to be had to the map marked C and filed in this cause.

ALPHEUS FITCH,
THOMPSON CAMPBELL,
R. AUG. THOMPSON,
Commissioners.

501 Filed in office Feb'y 14, 1854.
GEO. FISHER, *Sec't'y.*

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of decree of confirmation of the board of land commissioners in the case of Jose Noriega & Robert Livermore as the same appears in the transcript of the board of land commissioners now on file and of record in my office.

Attest my hand and seal of said district court this 10th
[SEAL.] day of November, A. D. 1886.
SOUTHARD HOFFMAN, *Clerk.*

Notice of Further Prosecution.

OFFICE OF THE ATTORNEY GENERAL
OF THE UNITED STATES,
WASHINGTON, 17*th Jan'y*, 1855.

JOSE NORIEGA & ROBERT LIVERMORE
vs.
UNITED STATES.
} 77.

You will please take notice that in the above case, decided by the commissioners to ascertain and settle private land claims in the

State of California in favor of the claimant, and a transcript of the proceedings in which was received in this office on the 28th day of September, 1854, the appeal in the district court of the United States for the northern district of California will be prosecuted by the United States.

C. CUSHING,
Attorney General.

(Endorsed:) No. 135. U. S. district court, northern district. The United States *vs.* Jose Noriega & Robert Livermore.
502 Filed Feb. 20, 1855. Jno. A. Monroe, c'k.

I, Southard Hoffmann, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of notice that appeal from the commissioners to ascertain and settle land claims in the State of California will be prosecuted by the United States in the U. S. district court, no. dist. Cal., Jose Noriega and Robert Livermore *vs.* The United States, L. C. 135, now on file and of record in my office.

[L. S.] Attest my hand and seal of said district court this 10th day of November, 1886.

SOUTHARD HOFFMAN, *Clerk.*

Application for Review & Reversal of Decree.

THE UNITED STATES
vs.
JOSE NORIEGA and ROBERT LIVERMORE. } D. C., 135. L. C., 77.

To the hon. dist. court of the U. S. for the northern district of Cala.:

The United States, by their attorney, represent that this cause is an application for a review of the decision of the U. S. land commission, whereby the title of the appellees was confirmed, as will appear by reference to the record in the case; that a transcript of said record was filed in this court on the 2d day of November, 1854; that a notice of appeal was filed on the 20th day of February, 1855; that the land claimed lies in the said district, and that said title is invalid. Wherefore appellants pray that the said decision of the commissioners be reversed and that said title be deemed invalid.

503 San Francisco, July 14, 1857.

P. DELLA TORRE,
U. S. Attorney.

(Endorsed:) 135. U. S. dist. court. The United States *v.* Joseph Noriega and Robert Livermore. Petition U. S. Filed July 14, 1857. W. H. Chevers, deputy.

I, Southard Hoffman, clerk district court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, & correct copy of petition U. S., The U. S. *vs.* Jose

Noriega & Rob't Livermore, L. C., N. D., 135, now on file & of record in my office.

Attest my hand & seal of said district court this 10th
[SEAL.] day of November, A. D. 1886.

SOUTHARD HOFFMAN, *Clerk.*

At a stated term of the district court of the United States of America for the northern district of California, held at the court-house, in the city of San Francisco, on Thursday, the third day of February, in the year of our Lord one thousand eight hundred and fifty-nine.

Present: The Honorable Ogden Hoffman, district judge.

Order Waiving Cause in Name of Executor & Executrix.

THE UNITED STATES
vs.
JOSE NORIEGA *et al.*

On reading and filing the certificate of the clerk of the probate court of the county of Alameda and the affidavit of Jose Livermore, and on motion of Judge Aldrich, counsel for claimants—

Ordered by the court that this cause be, and the same is
504 hereby, revived in the name of Jose Livermore, executor, and Josefa Higuera de Livermore, executrix, of the last will & testament of Robert Livermore, deceased, the dist. att'y being present and consenting thereto.

OGDEN HOFFMAN,
U. S. Dist. Judge.

(Endorsed:) No. 135. District court of the United States in and for the northern dist. of California. U. S. *v.* Jose Noriega *et al.* Order reviving suit in name of executor & executrix. Filed February 3, 1859. W. H. Chevers, clerk.

I, Southard Hoffman, clerk dist. court of the U. S. for the northern dist. of Cala., do hereby certify the foregoing to be a full, true, & correct "copy of order reviving suit in name of executor & executrix," The U. S. *vs.* Jose Noriega *et al.*, L. C., N. D., 135, now on file & of record in my office.

[L. S.] Attest my hand & seal of said district court this 10th day of November, A. D. 1886.

SOUTHARD HOFFMAN, *Clerk.*

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Saturday, the nineteenth day of February, in the year of our Lord one thousand eight hundred and fifty-nine.

Present: The Honorable Ogden Hoffman, district judge.

Order Granting Appeal.

THE UNITED STATES
v.
JOSE NORIEGA & JOSE LIVERMORE, Executor, and
505 JOSEFA HIGUERA DE LIVERMORE, Executrix of the Last Will and Testament of Rob't Livermore, Dec'd. } No. 135.

In this case, on application of P. Della Torre, Esq., U. S. attorney, made in open court, it is ordered by the court that an appeal on behalf of the United States from the final decision of this court rendered in said cause at the present term be, and the same hereby is, granted, and that a certified transcript of the pleadings, evidence, depositions, and proceedings in said cause be sent to the Supreme Court without delay.

OGDEN HOFFMAN,
Dist Judge.

(Endorsed:) United States district court, northern district of California. The United States *vs.* Jose Noriega *et al.* Order granting appeal. Filed Feb'y 19, 1859. W. H. Chevers, clerk.

I, Southard Hoffman, clerk of the dist. court of the U. S. for the northern district of Cala., do hereby certify the foregoing to be a full, true, & correct "copy of order granting appeal," The U. S. *vs.* Jose Noriega *et al.*, L. C., N. D., 135, now on file & of record in my office.
[L. S.] Attest my hand and seal of said district court this 10th day of November, A. D. 1886.

SOUTHARD HOFFMAN, *Clerk.*

506 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Friday, the 18th day of February, A. D. one thousand eight hundred and fifty-nine.

Present: The Hon. Ogden Hoffman, district judge.

Decree of Confirmation by U. S. Dist. Court.

THE UNITED STATES
vs.
JOSE NORIEGA and JOSE LIVERMORE, Executor, and JOSEFA HEGURA DE LIVERMORE, Executrix, of the Last Will and Testament of Robert Livermore, Deceased. } No. 135.

This cause came on to be heard on appeal from the final decision of the board of commissioners to ascertain and settle private land claims in the State of California under the act of Congress approved March 3, 1851, upon the transcript of the proceedings and decision of the said board of commissioners and the papers and evidence upon which the said decision was founded and upon the further

evidence filed in this court, and it appearing to the court that the said transcript has been duly filed according to law and the cause having regularly come to a hearing, it is by the court hereby ordered, adjudged, and decreed that the said decision be, and the same is hereby, in all things affirmed; that the claim of the appellees is a good and valid claim, and that the same is hereby confirmed.

The land of which confirmation is hereby made is known as "Las Pocitas," and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the es-
507 tablishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the boundaries named, and if less than that quantity be contained therein, then that less quantity is hereby confirmed.

Reference for further description to be had to the maps, marked C, filed in this case.

Dated San Francisco, February 18th, A. D. 1859.

OGDEN HOFFMAN,
U. S. District Judge.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I, George C. Gorham, clerk of the district court of the United States for the northern district of California, hereby certify the foregoing to be a full, true, & correct copy of the original final decree of confirmation in the case of the United States *vs.* Jose Noriega *et al.* on file and of record in the clerk's office of said district court.

Witness my hand and seal of said court hereto affixed this seventh day of June, A. D. 1865.

[SEAL.] GEO. C. GORHAM, *Clerk,*
Per DAN'L T. SULLIVAN, *Deputy.*

(Endorsed:) No. 135. United States district court, northern district of California. Las Pocitas. The United States # 377 *vs.* Jose Noriega *et als.* Copy decree of confirmation. Paid $3.50. D. T. Sullivan, clerk.

508 *Decree & Mandate of U. S. Supreme C't Confirming Grant.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judge of the district court of the United States for the northern district of California, Greeting:

Whereas lately in the district court of the United States for the northern district of California, before you, in a cause between the United States, appellants, and Jose Noriega and Jose Livermore, executor, and Josifa Higuero de Livermore, executrix, of the last will and testament of Robert Livermore, deceased, appellees, the decree of the said district court was in the following words, viz: "This cause came on to be heard on appeal from the final decision of the

board of commissioners to ascertain and settle the private land claims in the State of California under the act of Congress approved March 3, 1851, upon the transcript of the proceedings and decision of the said board of commissioners and the papers and evidence on which the said decision was founded and upon the further evidence filed in this court; and it appearing to the court that the said transcript has been duly filed according to law and the cause having regularly came to a hearing, it is by the court hereby ordered, adjudged, and decreed thet the said decision be, and the same is hereby, in all things affirmed; that the claim of the appellees is a good and valid claim, and that the same is hereby confirmed.

The land of which confirmation is made is known as "Las
509 Pocitas" and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed.

Reference for further description to be had to the map, marked C, filed in this case," as by the inspection of the transcript of the record of the said district court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and, on the motion of Mr. Attorney General Stanton, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court be, and the same is hereby, affirmed 24 Jan'y:

You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty.

510 WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

(Endorsed:) No. 135, No. 64. December term, 1860. Mandate Supreme Court United States. United States *vs.* Noriega *et al.* Filed Feb'y 24, 1865. W. H. Cheevers, clerk.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Friday, the twenty-fourth

day of February, in the year of our Lord one thousand eight hundred and sixty-five.

Present: The Honorable Ogden Hoffman, district judge.

Order for Filing Mandate & to Proceed as upon Final Decree.

THE UNITED STATES
v.
JOSE NORIEGA *et al.* } No. 135.

And now come the said claimants, by their attorneys, and present the mandate of the Supreme Court of the United States in the above-entitled cause; whereupon is is ordered that said mandate be filed in the cause, and that said claimants be allowed to proceed under the decree of this court, affirmed by the Supreme Court of the United States, as under final decree.

OGDEN HOFFMAN,
Dist. Judge.

511 DEPARTMENT OF THE INTERIOR,
U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL.

I, R. P. Hammond, Jr., U. S. surveyor general for the district of California, do hereby certify that the ten (10) pages preceeding and hereto annexed are full, true, and correct copies of certain documents now on file and of record in my office and in my custody; that I have carefully compared said copies with said written documents, and that they are true & correct transcripts therefrom.

[L. S.] Witness my hand and the official seal of this office this fifteenth (15) day of November, 1886.

R. P. HAMMOND, JR.,
U. S. Surveyor General, Dist. of Cal.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Friday, the 24th day of February, in the year of our Lord one thousand eight hundred and sixty-five.

Present: The Honorable Ogden Hoffman, district judge.

UNITED STATES
v.
JOSE NORIEGA *et al.* } No. 135.

And now come the said claimants, by their attorneys, and present the mandate of the Supreme Court of the United States in the above-entitled cause; whereupon it is ordered that said mandate be filed in the cause and that said claimants be allowed to proceed under the decree of this court, affirmed by the Supreme Court of
512 the United States, as under final decree.

OGDEN HOFFMAN.
District Judge.

(Endorsed:) Filed Feb'y 24, 1865. W. H. Chevers, clerk.

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of "order to file mandate of Supreme Court," The U. S. *v.* Jose Noriega *et al.*, L. C., N. D. No. 135, now on file & of record in my office.

Attest my hand and seal of said district court this 10th [SEAL.] day of November, A. D. 1886.

SOUTHARD HOFFMAN, *Clerk.*

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

U. S. Circuit Court, Dist. of Cal.

U. S. *v.* CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "27." S. C. H., Examiner.

Order for Survey of Grant.

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *September* 21, 1865.

SIR: Whereas it appears by a certified copy of a mandate placed on file in this office that the Supreme Court of the U. S. affirmed the decision of the U. S. district court for the northern district of California confirming the claim of Jose Noriega and Jose Livermore, executor, and Josefa Higuera de Livermore, executrix, of the last will and testament of Robert Livermore, deceased, to a tract of land named Las Pocitas; and whereas application has been made by the parties interested for a survey and location of said claim, the
513 estimated amount for the expenses thereof having been duly deposited, I have thought proper to appoint you my deputy in this special case for the execution of said survey.

In the language of the decree of the U. S. district court, herein referred to, the tract confirmed to the claimants is as follows: "The land of which confirmation is hereby made is known as 'Las Pocitas' and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas; on the east by the Sierra de Buenos Ayres; on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed; reference for further description to be had to the map marked C, filed in this cause."

Section 7 of the act of Congress of July 1st, 1864, directs this office in such cases "to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries

of the claim; but when such decree designates only the outboundaries within which the quantity confirmed is to be taken the location of such quantity shall be made as near as practicable in one tract, and in a compact form.

You will therefore make your survey in accordance with the requirements of the law and the said decree of confirmation.

In all other respects you will comply with the printed instructions of this office, dated June 1st, 1864, relative to the location of
514 private grants, a copy of which is herewith enclosed for your information and guidance.

A copy of the above-mentioned map, marked C, is also enclosed herewith for your governance.

Very respectfully, your ob't serv't,

——— ———,
U. S. Sur. Gen'l.

Eben H. Dyer, Esq., U. S. deputy surveyor.

(Endorsed:) U. S. sur. gen'l's office, Sept. 21, 1865. Instructions to Eben H. Dyer, D. S., for survey of Rancho Las Pocitas. R. Livermore.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "28." S. C. H., Examiner.

Notes of Survey by E. H. Dyer, Called "Dyer Survey."

I, O. B. Simpson, having been appointed compassman in the employment of E. H. Dyer, U. S. deputy surveyor, do solemnly swear that I will well and faithfully execute the duties confided to me to the best of my skill and ability.

O. B. SIMPSON,
Compassman.

Subscribed and sworn to before me this — day of ——, 18—.
E. H. DYER,
U. S. Deputy Surveyor.

We, H. H. Garrett and Pedo Arrais, do solemnly swear that we will well and faithfully execute the duties of chain-carriers; that we will level the chain upon uneven groud and plumb the tally pins, whether by sticking or dropping the same, and that we will report the true distances to all notable objects, and the true lengths of all lines we may assist in measuring, to the best of our
515 skill and ability.

H. H. GARRETT, *Chainman.*
PEDRO ARRAIS, *Chainman.*

Subscribed and sworn to before me this — day of ——, 18—.
E. H. DYER,
U. S. Deputy Surveyor.

Field-Notes of the Survey of the Rancho Las Pocitas, Alamada County, California, by E. H. Dyer, U. S. Deputy Surveyor.

Beginning at a post marked V. S. J. No. 25, in a mound of stones on the east boundary of the Rancho el Valle de San Jose, said line being also known as the line of the establishment of the Mission of San Jose, thence following said line south—variation 150° 50′ east—

3.60, left bank of Arroyo Mocho, runs N. W.

55.00, leave valley, enter rolling hills.

176.42, set a post, marked L. P. No. 1, in a mound of earth and stone on the top of a high ridge, course N. W. & S. E.; thence on legal subdivision lines over rolling hills forming the south boundary of the valley known as Livermore Valley.

East.

167.00, channel of Arroyo Mocho, 300 chs. wide, running N. W.

197.48, intersect range line between ranges 2 and 3 east, township 3 south, 60.00 chains north of corner to townships 3 and 4 south, ranges 2 & 3 east; thence through township 3 S., R. 3 E.

280.06, intersect line between secs. 31 and 32, 20 chs. south of cor. to secs. 29, 30, 31, and 32.

420.06, to the S. W. corner of the N. E. ¼ of N. E. ¼ of sec. 33, on slope of ridge tending N. W.; thence

North.

20.00, intersects line between secs. 28 and 33.

516 81.00, a creek 1.00 chs. wide runs N. W.

81.71, road to Corral Hollow, course S. E.

100.00, intersects line between secs. 21 and 28.

120.00, to the N. W. cor. of the S. E. ¼ of S. E. ¼ of sec. 21, on the foot-hills of the Las Cuevas range of mountains, or Sierra de Buenos Ayres; thence following said Las Cuevas range near the westerly base of same over low, rolling hills

West.

20.00, to the S. W. cor. of the N. W. ¼ of the S. E. ¼ of sec. 21, at edge of valley; thence north through middle of secs. 21, 16, 9, & 4.

45.00, leave valley and ascend rolling hills.

240.00, to the N. W. cor. of the S. W. ¼ of the S. E. ¼ of section 4. Sta. on the top of a small hill near the westerly base of the Las Cuevas range; thence

West.

40.00, cross line between secs. 4 and 5.

120.00, leave hills and enter main valley, crossing line between secs. 5 and 6.

160, to the N. E. cor. of the S. E. ¼ of the S. W. ¼ of sec. 6; thence

North.

20.00, leave valley and ascend low, rolling foot-hills of Las Cuevas range.

59.75, intersect township line between townships 2 and 3 S., range 3 east, at ¼ sec. cor., between secs. 6 and 31.

114.09, brook in ravine, runs W.; 115.09, road to Stockton, course E. & W.; 116.29, telegraph line, E. & W.

139.75, to ¼ sec. cor. on line between secs. 30 and 31, T. 2 S., R. 3 E.

159.75, to S. E. cor. of N. E. ¼ of S. W. ¼ of sec. 30, sta.; thence

517 West.

42.62, intersects line between ranges 2 and 3 east, township 2 south, 100 ch's north of cor. to townships 2 and 3 south, ranges 2 and 3 east.

62.62, set a post, marked L. P. No. 8, in earth mound near edge of valley; thence north.

120.00, set a post, marked L. P. No. 9, in a mound of stones. The Las Cuevas peak bears from this point N. 11° W., dist. 105.00 chains; thence west.

100.00, set a post, marked L. P. No. 10, in a mound of stones at edge of valley; thence north

100.00, to the south boundary of the Rancho de la Cañada de las Baqueros station, from which post L. P. No. 11 bears north; distance, 20 ch's; thence west, along line of Rancho Cañada de las Baqueros, 118.27, to post C. L. B. No. 6, at S. W. cor. of said rancho;

Thence north

20.00, to station; thence leaving line of Rancho Cañada de las Baqueros, S. 89° 34 W.

240.04, intersects line between ranges 1 and 2 east, t'p 2 S., 19.26 ch's N. of cor., to secs. 7, 12, 13, and 18.

479.61, to sta. No. 6 of the Rancho San Ramon; thence from said sta. No. 6 over low hills

West,

following the line of said rancho and adopting the official survey thereof,

20.00, to sta. No. 5 of said survey; thence south

80.00, to sta. No. 4 of said survey; thence west

20.00, to sta. No. 3 of said survey; thence south

518 220.00, to post marked S. R. D. 2, being the N. W. corner of the Rancho Santa Rita; thence following the line of said rancho and adopting the official survey thereof; thence over rolling hills east

120.00, to post marked S. R. D. 3; south

40.00, to post marked S. R. D. 4; east

80.00, to post marked S. R. D. 5; south

40.00, to post marked S. R. D. 6; east

40.00, to post marked S. R. D. 7 and S. R. 28, on line of Rancho el Valle de San Jose; thence following the line of said rancho and adopting the official survey thereof

North

80.00, to post marked V. S. J. D. 2; thence east
98.09, to post marked V. S. J. D. 3; thence S. 2° 50 E.
111.00, to white oak marked V. S. J. 26; thence, over level gravelly land, S. 51¾ E.
279.00, to place of beginning, containing 43,011.31 acres.

Notes of Dyer Survey of Las Pocitas.

We do hereby certify that we assisted E. H. Dyer, U. S. deputy surveyor, in surveying the boundary lines of the Rancho Las Pocitas, situated in the county of Alameda, in the State of California, and finally confirmed to —— ——, and that said rancho has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed and the boundary monuments established according to the laws of the United States and the instructions of the surveyor general.

O. B. SIMPSON, *Compassman.*
H. H. GARRETT, *Chainman.*
PEDRO ARRAIS, *Chainman.*
—— ——, *Axeman.*
—— ——, *Flagman.*

519 Subscribed and sworn to before me this — day of —— 18—.

E. H. DYER,
U. S. Deputy Surveyor.

I, E. H. Dyer, U. S. deputy surveyor, do solemnly swear that in pursuance of instructions from Lawrence Upson, U. S. surveyor general for the State of California, bearing date the — day of ——, 18—, and in strict conformity to the laws of the United States and the said instructions from the surveyor general, I have well and faithfully surveyed the boundary lines of the Rancho Las Pocitas, situated in the county of Alameda, in the State of California, and finally confirmed to —— ——; and I do further solemnly swear that the foregoing are the true and original field-notes of said survey.

E. H. DYER,
U. S. Deputy Surveyor.

Subscribed by said E. H. Dyer, U. S. deputy surveyor, and sworn to before me, a notary public for the city & county of San Francisco, in the State of California, this 9th day of October, 1865.

[L. S.] E. V. SUTTER,
[5c. stamp.] *Notary Public.*

(Endorsed:) Field-notes. "Las Pocitas." E. H. Dyer, dep. sur.

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL.

I, R. P. Hammond, Jr., U. S. surveyor general for California, do hereby certify that the foregoing is a full, true, & correct copy of the "field-notes" of the "Las Pocitas" rancho as surveyed by E. H. Dyer, on file and a part of the records of this office.

Witness my hand and the official seal of this office this 22nd day of October, A. D. 1886.

[SEAL.]

R. P. HAMMOND, JR.,
U. S. Sur. Gen'l, Dist. of Cal.

Filed July 26, 1887.

L. S. B. SAWYER, *Clerk.*

520 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 30. S. C. H., Examiner.

Letter of Mr. Pringle, Att'y for Claimants under Las Pocitas.

SAN FRANCISCO, *February 26th*, 1866.

L. Upson, surveyor general.

SIR: I beg to lay the following facts before you in the matter of survey of Rancho Las Pocitas, finally confirmed to my clients, the heirs of the Livermore family.

Mr. Livermore, in his lifetime, was a cattle-raiser, first in company with a Mr. Gerlack and afterwards with José Noriega. He has occupied the tract in person since the year 1835, as is shown by the accompanying copy of a report made by Dolores Pacheco and the testimony of Guelermo Castro, given before the late board of land commissioners.

The decree of the U. S. district court under which a survey has been made describes the boundaries with precision, and then states: "Containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed; reference for further description to be had to the map marked C, filed in the case."

It will be seen by a careful perusal of the language of this decree that the district court intended to confirm the tract as it is found on the ground, describing fully the boundaries, and adding as further description: Containing in all (the boundaries) that quantity, provided it should be so found; but if less, then that quantity is confirmed; and refers to the map. A copy of this map is herewith enclosed.

521 By reference thereto the boundaries mentioned in the decree are found in their proper places, and are all plainly marked, no boundary being left uncertain for quantity. A

case somewhat similar was decided in the Supreme Court, and is found in vol. 22 Howard's Sup. C't Rep'ts, page 225, The U. S. *vs.* Pacheco *et al.*, L. C. No. 168. In this case the land commission confirmed the Arroyo de las Nueces to the extent of two leagues, being the same land described in the grant. The 4th condition in said grant is that the land comprises two leagues, "sobre poco mas a menos," a little more or less, as is shown in the map in the espediente, the sobrante remaining to the nation.

The grant relates that the concession was approved by the territorial deputation for the land between the Arroyo de las Nuecas and the Sierra de los Golgones.

The Supreme Court decide that the clear intention was to give to boundaries as shown by the diseño, and the survey was made for four leagues.

So in the case now presented the diseño shows the boundaries with more that the usual distinctness, and is specially referred to by the decree.

The juz de paz, Dolores Pacheco, in 1846, reports that the grantees have been in possession to the whole extent of the boundaries for 11 or 12 years, "as a cattle-raiser." This last fact alone would show that the boundaries were conceded by all the neighbors, Dolores Pacheco himself being one of them, and the increase of stock for 11 years would require more than two leagues of land.

522 A possession by specific boundaries which has been maintained and recognized by neighbors for 11 or 12 years in 1846 is certainly one of the strongest equities ever presented to the Government. The wording of the decree shows the intention to confirm to boundaries. If not, the hon. judge would have inserted one of the usual clauses, such as "and no more."

I rely with great confidence upon the fact that the words "and no more," which are inserted where a limitation of quantity is intended, are omitted.

As you have expressed some doubts as to the meaning of the decree, I ask that the survey, with the accompanying papers, be placed before the Commissioner before advertising or going to further expense.

Very respectfully your ob't serv't,

EDWARD J. PRINGLE,
Att'y for Claimants.

(Endorsed:) (Edward J. Pringle to Mr. Upson. Feb'y 26, '66. History of case.)

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "31." S. C. H., Examiner.

Decision of Sec't'y Browning Ord. New Survey.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *July* 30, 1868.

SIR: I have received your communication of the 18th inst. submitting papers in the matter of the survey of the Rancho Los Pocitas, in California.

This is a sobrante grant and the court confirmed the same as "containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed." The survey was made under the act of July 1st,
523 1864. By that survey there is faund within the boundaries $43,011\frac{31}{100}$ acres, and it was approved by the surveyor general February 8th, 1867.

You refer to the cases of Las Puerte, Island of Santa Cruz, and Corral de Piedra, considering them as similar to this. You hold that the rulings and principles therein laid down by the "supervisory authority" must bind and control your action in this case; therefore you do not feel authorized to interfere with said survey although you do not approve it, and hold that in accordance with said rulings it must stand as the recognized survey for patenting. "In each of the cases you cite the survey was made under the act of 1860 and was a finality when it reached your office. In the present case the survey, being made under the act of 1864, is subject to your approval or disapprova*ble*, and your action may be reviewed by the head of this department. The survey is clearly wrong and it will be returned to the surveyor general, with instructions to reduce the quantity of land to 'two square leagues.'"

Very respectfully your ob't serv't,

O. H. BROWNING, *Secretary.*

Hon. Jas. S. Wilson, Commissioner of the General Land Office.

(Endorsed:) O. H. Browning to Jas. S. Wilson, Com. L. O., about Rancho Las Pocitas. July 30th, 1868.

524 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 32. S. C. H., Examiner.

Letter of Com'r Enclosing Decision of Sec'l'y.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Aug. 5th*, 1868.

U. S. surveyor general, San Francisco, Cal.

SIR: For your information and guidance I enclose herewith a copy of the decision of the Secretary of the Interior, dated 30th ult., that the survey of the Rancho "Las Pocitas," embracing 43,011$\frac{31}{100}$ acres, approved by the survoyor general 8th February, 1867, is wrong, and must be reduced to "two square leagues."

You will inform the parties interested of the decision and take measures to carry the same into effect.

Very respectfully, J. S. WILSON,
Commissioner.

(Endorsed:) Gen'l Land Office, Aug. 5th, 1868. Las Pocitas rancho must be reduced in area. Received Sept. 2d. Notified grantees on the 18th Sept.

U. S. Circuit Court, Dist. of Cal.

U. S.
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CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "33." S. C. H., Examiner.

LAND OFFICE OF THE WESTERN
PACIFIC RAILROAD COMPANY,
Rooms Nos. 3 and 4, S. E. corner
Jackson and Montgomery Sts.,
SAN FRANCISCO, *Dec. 28th*, 1868.

Sherman Day, surveyor general.

DEAR SIR: Please inform me of the reason why the survey of the Rancho "Pocitas," in Alameda Co., has not been made ere this, in accordance with order of August, 1868, from Department at Washngton, D. C., and oblige

Yours, &c., CHAS. McLAUGHLIN,
Land Agent W. P. R. R. Co.

(Endorsed:) Chas. McLaughlin. Dec. 28, 1868. Rec'd Dec. 28. Wants to know why Rancho de los Pocitas (Livermore's rancho) is not surveyed.

525 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 34. S. C. H., Examiner.

WASHINGTON CITY, D. C., *January 14th*, 1869.

Hon. Jas. S. Wilson, Com's'r of Gen'l Land Office.

DEAR SIR: I received yesterday a telegraph from Chas. McLaughlin, of San Francisco, Cal., in regard to the delay or refusal of the surveyor general of that State to survey, according to your order of August last, the Las Pocitas grant of land.

The dispatch of McLaughlin is as follows:

SAN FRANCISCO, CAL., *Jan.* 12.

"Have made many requests of surveyor general to have Las Pocitas surveyed, but get no reply; attend to this at Land Office, Interior Department.

CHAS. McLAUGHLIN."

An order to make new survey was sent out on the 1st of August. The delay, I am satisfied, is intentional on the part of the surveyor's office at San Francisco, and is certainly in contempt of your order. I request now a peremptory order from you, which I will send out by telegraph. If the survey has not been deposited, I will see that it is on receipt of your order by the surveyor general of Cal.

The money to defray expense of survey has been tendered; whether deposited or not I do not know.

Respectfully, your ob't serv't,

JAS. W. McCORKLE,
Willard's Hotel.

(Endorsed:) Copy of J. W. McCorkle's letter to Com'r of Gen'l Land Office, Jan. 14, 1869. Rec'd at San Franc'o Feb. 2, 1869.

526 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 35. S. C. H., Examiner.

Correspondence in Reference to Survey.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *January 30th*, 1869.

Sherman Day, Esq., U. S. surveyor gen'l, San Francisco, California.

SIR: A letter dated 29th inst. from J. W. McCorkle and Henry Beard, as attorneys, alleges that continuous and repeated attempts

have been made to have the survey of the Rancho "Los Pocitas" executed in accordance with the decision of the Secretary of the Interior, communicated to you on 5th August last, and the Surveyor General has neglected and practically refused to obey the order of this office to take measures to carry the department ruling into effect.

On receipt of this you will, if you have not already done so, notify the parties interested of the amount necessary to pay for the survey directed to be made, and when the money shall have been properly deposited you will proceed to carry the Secretary's decision into effect, executing the survey according to law, and immediately advise this office of the action heretofore had under the instructions of 5th August last.

Very respectfully, JAS. S. WILSON,
Commissioner.

(Endorsed:) Jas. S. Wilson, Commissioner of Gen'l L. O. Jan'y 30, 1869. Rec'd Feb'y 16th, 1869. Ordering to proceed with survey of Rancho de Las Pocitas.

527 U. S. Circuit Court, Dist. of Cal.

U. S.
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CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 36. S. C. H., Examiner.

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL., *March 2d*, 1869.

E. H. Dyer, Esq., U. S. dep. sur.

SIR: In accordance with instructions from the Hon. Commissioner, you are hereby required to reduce the former survey of the Rancho "Los Pocitas," confirmed to Jose Noriega *et al.*, to the quantity of two square leagues of land.

In executing the same you will be guided by the printed instructions, copy of which you have.

Very resp'y, your ob't serv't,

SHERMAN DAY,
U. S. Sur. Gen'l.

(Endorsed:) Copy of letter to E. H. Dyer, dep. sur, M'ch 2d, 1869.

U. S. Circuit Court, Dist. of Cal.

U. S.
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RESPONDENT'S EXHIBIT 37. S. C. H., Examiner.

Wilson, Com'r, to Sherman Day, Surv. Gen'l.

DEPARTMENT OF THE INTERIOR,
GEN'L LAND OFFICE, *June 16th*, 1869.

Sherman Day, Esq., U. S. surv. gen'l, San Francisco, Cal.

SIR: For your information and guidance I have to state that by a communication dated 15th inst. from the Secretary of the Interior this office has been advised of the pendency of an application by the heirs of Livermore for a reconsideration of the decision of the department, bearing date 30th July last, adverse to the survey of Pocitas rancho as affirmed by the surveyor general of California 8th February, 1867, and that sixty days from service of notice upon the adverse party has been allowed for filing in this office such briefs as they may think proper.

The Secretary directs that in the mean time the decision of July 30th shall be suspended. You will govern yourself accord-
528 ingly and promptly acknowledge the receipt of this letter.

Very respectfully, JAS. S. WILSON,
Commissioner.

(Endorsed:) Com'r Gen'l Land Off., June 16, 1869. Rec'd June 29; ans'd July 19. Pocitas rancho and lands to be suspended. Suspended parts of T. 2 S, R. 3 E, and 2 S., R. 2 E.

U. S. Circuit Court, Dist. of Cal.

U. S.
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RESPONDENT'S EXHIBIT 38. S. C. H., Examiner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *December 22d*, 1869.

Sherman Day, Esq., U. S. sur. gen'l, San Francisco, Cal.

SIR: For your information and guidance, I enclose herewith a copy of the decision of the Secretary of the Interior, dated 4th inst., refusing to reconsider the decision of his predecessor, Mr. Browning, dated 30th July, 1868, in the case of the Rancho "Los Pocitas," in California, a copy of which was furnished you with my letter of 5th August, 1868.

You will inform the parties interested of the decision and take measures to carry the same into effect.

Very respectfully, your ob't serv't,

JAS. S. WILSON,
Commissioner.

(Endorsed:) Commiss. Gen'l Land Office, Dec. 22, 1869. Rec'd Jan'y 1, 1870. Answered. Decision of Sec'y of Interior in Las Pocitas case.

U. S. Circuit Court, Dist. of Cal.

U. S. v. CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 39. S. C. H., Examiner.

Decision of Sec't'y of Int. Denying a Rehearing on Survey of Las Pocitas.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Dec. 4th*, 1869.

SIR: On the 15th of June last, on being informed by you that the decision of this department of the 30th of July, 1868, in the matter of the survey of the tract of land known as the "Rancho
529 Los Pocitas" had not been carried into effect, I directed you, in view of the application of the heirs of Livermore for a reconsideration of that decision, to notify "the attorneys of the adverse party of the pendency of this application, and afford them sixty days after the receipt of such notice to file in your office such briefs as they may think proper."

You were thereafter instructed to forward to the department the original papers and such briefs as might be filed. I received with your letter of the 28th August the papers in this case, including the briefs.

It appears that under said order of July a contract for the survey was made on the 2d of March last and approved by you on the 24th April, and that on the 27th March a survey in the field was closed. No action was, however, taken by the surveyor general on the survey nor was it advertised, as proceedings were suspended by orders transmitted from your office.

These facts appear from a letter of the surveyor general and his certificate, bearing date July 16th, 1869, appended to the plat of survey.

A preliminary question arises as to my authority to set aside the decision of Mr. Secretary Browning construing the decree of the district court and rejecting a survey that had then been made. I remark, in this connection, that no new fact has been since disclosed, and my action is invoked solely upon the ground that the effect and purport of that decree were misapprehended by him.

It is insisted that the claimants are entitled to all the land
530 embraced within the exterior boundaries mentioned in the original grant and the decree of confirmation, and not merely to the specific quantity of two leagues mentioned in the decree of the district court.

His decision set aside a survey covering all the land within those boundaries, and he directed a new one, limiting the area to be embraced by it to two square leagues. I am asked to reconsider and

set aside that decision, approve the rejected survey, and thus "correct a grave and fatal error" into which my predecessor has fallen.

There are several opinions of attorneys general and decisions of the Supreme Court which bear directly upon this question. They established the opinion that the head of a department cannot reverse and set aside the decision of his predecessor in a matter involving private rights and requiring the exercise of judgment and discretion; such a decision is quasi-judicial in its nature, and if each succeeding Secretary could disregard it and apply a new rule in the same case it is evident that in such matters there could be no final and conclusive action by the executive department.

I am not now called to pass upon the new survey; it is not before me, and no question respecting it has yet arisen. It is proper to add that if the status of the case was such as to justify me in reversing for an alleged error of law my predecessor's decision by which the original survey was rejected, I am not satisfied that the rights of the parties and the ends of justice require that the survey,
531 embracing the entire tract within the exterior boundaries, nearly ten squares leagues, should be now approved.

The papers are returned.

Very respectfully, your ob't serv't,

J. D. COX, *Secretary.*

Hon. Jas. S. Wilson, Com'r Gen'l Land Office.

(Endorsed:) Rancho "Los Pocitas." Decision of Sec'y of Interior in favor of smaller survey.

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 40. S. C. H., Examiner.

Approval by Com'r of Survey Las Pocitas.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 1, 1871.

James R. Hardenberg, Esq., U. S. surveyor general, San Francisco, Cal.

SIR: Referring to the letter dated 16th June last, from your predecessor, forwarding the survey of the Rancho "Los Pocitas," containing 8,880 acres, executed pursuant to the decision of the Secretary of the Interior, dated July 30th, 1868, and approved by Surveyor General Day May 11th, 1870, I have to state that I have under present date endorsed my approval upon the plat of said survey. You will promptly notify all parties interested of the fact and allow 30 days from service of notice for appeal to the Secretary of the Interior, and upon the expiration of said period, if appeal be not taken, you will so report; but, should appeal be taken, you will send

up all papers filed with you for submission to the head of the department. In the meantime you will please acknowledge the receipt of this and advise this office of the date of service of notice.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

532 (Endorsed:) Willis Drummond. M'ch 1st, 1871. Rec'd M'ch 10, 1871. Advising the issuance of patent to Rancho Los Pocitas. Notice issued 10. 30th days to appeal. Answ'd 10 M'ch, 1871. Def's Exhibit D. Soden, dep. cl'k.

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 41. S. C. H., Examiner.

Letter of Com'r Relative to Decision Sec't'y of Int.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 7th*, 1871.

J. R. Hardenberg, Esq., U. S. surv. gen'l, San Francisco, Cal.

SIR: For your information and guidance, I enclose herewith a copy of the decision, dated 6th inst., of the Hon. Acting Secretary of the Interior affirming the decision dated 1st March last of this office in the case of the survey of the Rancho "Los Pocitas," in California, containing 8,880 acres.

You will make the proper annotations upon the records of your office and relieve from suspension any lands outside of said survey heretofore held in suspension on account of this claim.

Please acknowledge the receipt of this letter.

Very respectfully, your ob't servant,

WILLIS DRUMMOND,
Commissioner.

(Endorsed.)

Willis Drummond, June 7th, 1871.
Rec'd 20th, "
Ans. 22d, "
Transmitting decision of Sec'y of Interior in "Las Pocitas. Def't's Exhibit E." Soden, dep. cl'k.

533 U. S. Circuit Court, Dist. of Cal.

U. S. vs. CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 42. S. C. H., Examiner.

Decision of Sec'ty of Int. Approving Survey Las Pocitas.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *June 6th*, 1871.

SIR: I have considered the objections made to the survey of the Rancho Las Pocitas, containing 8,880 acres, which was approved by you on the 1st March last, and, finding no valid reason for granting a new or further survey—

I hereby affirm your action in the premises.

The papers in the case received with your letter of the 6th ultimo are herewith.

Very respectfully, your ob't servant,

B. R. COWEN,
Acting Secretary.

The Commissioner of the Gen'l Land Office.

U. S. Circuit Court, Dist. of Cal.

U. S. v. CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 43.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., 27 *May*, 1872.

J. R. Hardenberg, Esq., U. S. sur. gen'l Cala., San Francisco.

SIR: I transmit herewith, for delivery to the parties entitled to receive the same, the patent for the Rancho "Los Pocitas," in Cala., Jose Noriega and Jose Livermore, executor, and Josefa Higuera Livermore, executrix, of the last will and testament of Robert Livermore, dec'd, confirmees.

Said patent is recorded in vol. 8, pp. 63 to 73, incl.

Please acknowledge the receipt.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

534 (Endorsed:) Las Pocitas. Hon. Willis Drummond, Com'r Gen'l Land Office. Letter, May 27th, 1872, dated —— —, —; answ'd —— 6th, 1872, enclosing patent.

DEPARTMENT OF THE INTERIOR,
U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL'A.

I, R. P. Hammond, Jr., U. S. surveyor general for the district of California, do hereby certify that the twenty-nine (29) pages preceding and hereto annexed are full, true, and correct copies of certain written documents, now on file and of record in my office and in my custody, relating to the surveys of the Rancho "Las Pocitas;" that I have carefully compared said copies with said documents aforesaid, and they are true & correct transcripts therefrom.

Witness my hand and the official seal of this office this fifteenth (15) day of November, 1886.

[SEAL.] R. P. HAMMOND,
U. S. Surveyor General, Dist. of Cal'a.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

535 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 45. S. C. H., Examiner.

Grant of Santa Rita Ranch to Jose Dolores Pacheco.

Juan B. Alvarado, Governor *ad interim* of the department of the Californias:

Whereas the citizen Jose Dolores Pacheco has solicited for his personal benefit and that of his family the tract of land embraced between the arroyo or cañada (creek or ravine) of the Tasajara and the tract of San Ramon, bounded by the house of the same tract of San Ramon up to the "Palos Secos," and from this point along the Tular to the Soma Alta (High Hill), by the arroyo or cañada of the said Tasajera, and by the sierra (mountains) and the tract of the citizen Bartoto Pacheco, the proper proceedings and investigations having previously been had agreeably to the laws and regulations, in virtue of the authority on me conferred, in the name of the Mexican nation I have thought proper to grant unto him the mentioned place, declaring — him the ownership thereof by the present letters, in the understanding that the said concession is made in strict conformity with the provisions of law, subject to the approval of the excellent the departmental junta and of the supreme government, and under the following conditions:

1st. He may inclose it without detriment to the crossings, roads, or servitudes. He will enjoy it freely and exclusively, dedicating it to the use or cultivation that may suit him best, but within one year he shall build a house and it shall be inhabited.

2d. Whenever the right of ownership is confirmed unto him he shall request the proper magistrate to give him judicial possession,

in virtue of this title, whereby the boundaries shall be marked
536 out, at the limits whereof he will set, besides the landmarks, some fruit or forest trees of some utility.

3d. The land whereof donation is made is of the extent designated upon the map annexed to the record of proceedings, with the proper limits. The judge who may give the possession will cause it to be measured agreeably to the ordinance in marking out the boundaries, leaving the surplus that may result to the nation for convenient purposes.

4th. If he contravene these conditions he will forfeit his right to the land, and it shall be open to denouncement by another party. In consequence I order that, the present serving him as a title and being held as firm and valid, record of it be made in the corresponding book, and that it be delivered to the interested party for his security and further purposes.

Given in Monterey on the 10th day of April, one thousand eight hundred and thirty-nine, this title being made on common paper in default of any of the corresponding stamps.

JUAN B. ALVARADO. (PARAPH.)

MANUEL JIMENO,
Sec'y of State. (PARAPH.)

This title has been recorded in the proper book, on leaf No. 2 ; in evidence whereof I sign the present.

MANUEL JIMENO. (PARAPH.)

His exc'y the Governor has ordered that this title be recorded in the prefecture of the first district.

JIMENO. (PARAPH.)

The above has been recorded on leaf 6 and reversed and
537 marked with No. 12 of the proper book that exists among the archives of this secretary's office of the prefecture of the first district.

San Juan de Castro, April 12th, 1839.

JOSE M'A COVARRUBIAS, *Sec'y.* (PARAPH.)

OFFICE OF THE SURVEYOR GENERAL OF THE UNITED STATES FOR CALIFORNIA.

I, R. P. Hammond, Jr., surveyor general of the United States for the State of California, and as such having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican territory or department of Upper California, as also the papers of the late board of commissioners to ascertain and settle private land claims in California, by virtue of the power vested in me by law do hereby certify that the 4 preceding and hereunto annexed pages of paper, numbered from one to four, inclusive, exhibit a true, full, and correct translation of the original grant contained in expediente No. 128, entitled " Expediente instituted by the citizen Jose Dolores Pacheco soliciting two square leagues of land in the district that lies between the ex-mission of San Jose and the

rancho of citizen Jose Maria Amador, 1837," and filed in case No. 60, Jose Dolores Pacheco, Santa Rita, as the same is designated on the docked of the aforesaid board of commissioners, and now on file in this office and in my custody; that I have carefully compared the same with said original, and that the same is a correct translation of the whole of such original.

In testimony whereof I have hereunto signed my name officially and cause- my seal of office to be affixed, at the city of San Francisco, this 17th day of November, 1886.

[SEAL.] R. P. HAMMOND,
U. S. Surveyor General for Cal'a.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

538 RESPONDENT'S EXHIBIT 44.

(Exhibits 30 to 43 are attached to Exhibit 27.)

[L. S.] Juan B. Alvarado, Gobernador interino del Departamento de las Californias:

Por cuanto el C'o Jose Dolores Pacheco ha pretendido, para su beneficio personal y el de su familia el parage comprendido entre el arroyo ó cañada de la Tasagera, y el sitio de S'n Ramon, colindante con la casa del mismo sitio de *de* San Ramon, hasta los Palos Secos, y desde este punto, tomando por el Tular á la Loma Alta, con el arroyo ó cañada de dicha Tasagera, y con la Sierra, y el terreno del C'o Bartolo Pacheco, practicadas previamente las diligencios y averiguaciones concervientes segun lo dispuesto por las leyes y reglamentos, usando de las facultades que me son conferidos; á nombre de la Nacion Mexicana, he venido en concederle el parage mencionado, de clarandole la propiedad de él por las presentes letras, entendiendose dicha concesion con entera conformidad á lo dispuesto por las leyes á reserva de la aproracion de la Ex'ma Junta Departamental y del Supremo Gobierno y bajo los condiciones siguientes.

539 1*a*. Podrá cercarlo sin perjudican las travecias, caminos y cervidumbres; lo disfrutarán libre y esclusivamente destinandolo al uso ó cultivo que mas le acomode pero dentro de un año fabricarán casa, y estará habitada.

2*a*. Cuando se le confirme la propiedad solicitaran del Juez respectivo que le dé posession juridica en virtud de este despacho, por el cual se demarcarán los linderos á cuyos limites, pondrán á mas de las mojoneras, algunos arboles frutales ó silvestres de alguna utilidad.

3*a*. El terreno que se le hace donacion es de la estension que esplica el diseño que corre en el espediente con sus limites respectivos; el Juez que diere la posesion lo hara medir conforme á ordenanza para señalan los linderos, quedando el sobrante que resulte á la nacion para los usos convenientes.

4*a*. Sé contravinieren á estos condiciones perderán su derecho al terreno, y será denunciable por otro.

En consecuencia mando que sirviendoles de titulo el presente y teniendose por firme y valedero, se tome razon en el libro á
540 que corresponde y se entregue al interesado para su resguardo y demas fines. Dado en Monterey á diez de Abril de mil ochocientos treinta y nueve, estendiodose es despacho en papel comun por no hauer del sellado que corresponde.

JUAN B. ALVARADO. (RUBRICA.)

MANUEL JIMENO,
S'rio del Despacho. (RUBRICA.)

Queda tomado razon de este despacho en el Libro respectivo á fojas segunda y para constancia lo firmo.

MANUEL JIMENO. (RUBRICA.)

El Ex'mo Señor Gobernador ha dispuerto se tome razon de este titulo en la Prefectura del primer Distrito.

JIMENO. (RUBRICA.)

Queda tomado razon á fojos 60th y señalado con el No. 12 del libro respectivo que obra en el archivo de la Secretariá de la Prefectura del primer distrito.

San Juan de Castro, Abril 12, de 1839.

JOSÉ M'A CEVARRUBIAS, *S'rio.* (RUBRICA.)

541 (Vignette.)

OFFICE OF THE SURVEYOR GENERAL OF THE UNITED STATES FOR CALIFORNIA.

I, surveyor general of the United States for the State of California, and as such having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican territory or department of Upper California, as also the papers of the late board of commissioners to ascertain and settle the private land claims in California, by virtue of the power vested in me by law, do hereby certify that the 3 preceding and hereunto annexed pages of paper, numbered from one to 3, inclusive, exhibit a true, full, and correct copy of the original title to José Dolores Pacheco for the tract named Santa Rita, found in Expediente No. 128, entitled "Espediente promovido por el cuidadano Jose Dolores Pacheco en pretencioñ de dos sitios de ganado mayor en el intermedio de la ex-mision de S'n José y el Rancho del Ciudadano José M'a Amado, 1837, 128, filed in case No. 60, Jose D. Pacheco, Santa Rita, as the same
542 is designated on the docket of the -foresaid board of commissioners, and now on file in this office and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom and of the whole of such original.

In testimony whereof I have hereunto signed my name
[SEAL.] officially and caused my seal of office to be affixed, at the city of San Francisco, this — day of September, 1886.

R. P. HAMMOND, JR.,
U. S. Surveyor General for California.

(Endorsed:) U. S. circuit court, dist. of Cal. U. S. *vs.* Curtner. No. 3106. Respondent's Exhibit 44. S. C. Houghton, examiner. Filed July 26, 1887. L. S. B. Sawyer, clerk.

543 U. S. Circuit Court, Dist. of Cal.

U. S. *v.* CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 48. S. C. H., Examiner.

Decree Ordering New Survey.

In the District Court of the United States in and for the District of California.

THE UNITED STATES *vs.* JOHN YONTZ, Administrator of Jose Dolores Pacheco. } L. C. No. 60. D. C. No. 155.

Decree of Court in Matters of Survey of Santa Rita Rancho.

In the matter of the survey and location of the Rancho Santa Rito.

This cause came on this day to be heard and was argued by counsel, and thereupon, and in consideration thereof and of the consent attached to this decree and of the agreement hereunto appended, it is ordered, adjudged, and decreed, and the court doth order, adjudge, and decree, that the official survey of said rancho be, and is hereby, vacated, annulled, and set aside.

And it is further ordered, adjudged, and decreed that the surveyor general of the United States proceed without delay to make another and new survey of said rancho as follows: Commencing at the beginning point of said official survey, marked post S. R. 1, thence east along the northern line of said survey to post S. R. 29, being the southeastern corner of the official survey of the San Ramon rancho, where is a large stone; thence north along the eastern line of said survey of the San Ramon rancho one mile; thence east one mile and a half; thence south half of a mile; thence east one mile; thence south half of a mile to the northern line of the official survey of the Santa Rita rancho; thence east with said northern line to post S. R. 28; thence south to corner of said survey marked post S. R. 27; thence in a straight line to point marked in said
544 survey post S. R. 22; thence in a straight line to a point midway between the homes of Samuel B. Martin and Juan Bernal and on a direct line drawn from one house to the other and equidistant from each; thence in a straight line through a rodeo ground and through the middle of a small spring on the margin of the Tular, where Juan Bernal's people washed; thence on a continuation of said line till it reaches the middle line of said Tular, as defined and drawn on the topographical map of W. J. Lewis attached to his deposition in this case; thence along the middle of said Tular

with Lewis' said middle line to the southern point of the laguna at a point in said official survey marked sycamore V. S. 1, 28, and S. R. 18; thence south with the line of said survey to the Palos Secos at a point marked oak tree, V. S. 1, 1, & S. R. 17; thence southwesterly with said survey to a point marked S. R. 16, thence northwesterly in such a manner as to include two square leagues of land.

And it is further adjudged and decreed that said official survey be modified as above directed, and as soon as completed be returned into this court by the said surveyor general and filed in the clerk's office thereof.

OGDEN HOFFMAN,
U. S. District Judge.

No objection to the foregoing order, reserving the rights of those claiming under the United States who may be embraced within the new survey.

WM. H. SHARP, *U. S. Attorney.*
545 E. W. F. SLOAN,
Att'y for San Ramon Rancho.
WILLIAMS AND THORNTON,
Att'y for S. B. Martin, Owner of Santa Rita Rancho.

Articles of Agreement Relative to Survey of Santa Rita Rancho.

Articles of agreement made and entered into this 27th day of February, 1862, between Antonio Suñol, Juan Bernal, and Augustine Bernal, parties of the first part, and Samuel B. Martin, party of the second part.

Whereas a controversy exists and is now pending in the district court of the United States in and for the northern district of California between the said parties of the first part, owners and confirmees of the "Rancho el Valle de San Jose," and the party of the second part, owner of the Rancho "Santa Rita," in regard to the dividing line between said ranchos; and whereas the said parties are anxious to settle this controversy by agreement and mutual concession:

Now, therefore, this agreement witnesses that, in consideration of the premises and the sum of one dollar in hand paid by the party of the second part to the parties of the first part, the receipt whereof is hereby acknowledged, it is hereby stipulated and agreed that the dividing line between said ranchos is and shall be hereafter as follows: Commencing at a point marked on the plat of the official survey of the Santa Rita rancho, as made and returned into said district court, "post S. R. 27," being the southeast corner of said survey, and thence in a straight line to the point marked on said plat "post S. R. 22;" thence in a straight line to a point midway between the houses of the said Martin and said Juan Bernal and on a direct line drawn from the one house to the
546 other and equidistant from each; thence in a straight line through a rodeo ground and through the middle of a small

spring on the margin of the Tular, where Juan Bernal's people washed; thence on a continuation of said line till it reaches the middle line of said Tular, as defined and drawn on the topographical map of W. J. Lewis, attached to his deposition in the case of The United States *vs.* John Yontz, administrator, etc., wherein is involved the matter of the survey and location of the said Santa Rita rancho; thence along the middle of said Tular with said dotted line to the southern point of the laguna at a point on said official plat marked "sycamore V. S. J. 28 and S. R. 18;" thence south with line of official survey to Palos Secos; thence southwesterly to "post S. R. 16," it being the intention to divide the said Tular, or rather so much of it as is below the point where the said line continued from said spring touches Lewis' said middle line, equally between the said Martin and the parties of the first part; and it is further agreed on the part of and by the said parties of the first part that they will withdraw in open court all exception and exceptions to the said official survey of the said Rancho Santa Rita; and the said Martin on his part hereby agrees to consent, in open court, to a modification of said survey so as to conform it to said agreed line; and the said parties hereto hereby agree that the decree in the said case of The United States *vs.* John Yontz, administrator, shall conform to the line herein agreed to, and as to said line shall be a consent decree. It is, however, expressly understood that the said Martin shall have the right to apply to the court to include in
547 his survey a sufficiency of land to the north & west of his present survey to make up his full two leagues.

Witness our hands and seals the day and year first above written.

ANTONIO SUÑOL. [ss.]

In his
JUAN x BERNAL. [ss.]
mark.

his
AUGUSTINE x BERNAL. [ss.]
mark.

SAM'L B. MARTIN. [ss.]

Witness to Juan Bernal's signature:
I. W. KOTTINGER.

Witness as to Augustine Bernal:
J. B. CROCKET.

Test: JNO. WILLIAMS.

We hereby consent, on behalf of Augustine and Juan Bernal and Antonio Suñol, that a decree be entered in the case of United States *vs.* John Yontz, admi's, reforming the official survey in said cause so as to make it conform to the above stipulation, and in order that such decree may be entered we hereby withdraw the exceptions heretofore filed by us to said official survey in the names of the said Bernals and Suñol.

Dated March 5th, 1862.

CROCKETT AND CRITTENDEN,
Att'ys for Bernals & Suñol.

(Endorsed:) Filed March*ed* 8th, 1862. W. H. Chevers, clerk.

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of the decree ordering new survey in the cause entitled U. S. *vs.* John Yountz, adm., now on file and of record in my office.

Attest my hand and seal of said district court this 18th day of March, A. D. 1887.

[L. S.] SOUTHARD HOFFMANN, *Clerk.*

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

548 U. S. Circuit Court, Dist. of Cal.

U. S.
v. } No. 3106.
CURTNER.

RESPONDENT'S EXHIBIT 49. S. C. H., Examiner.

Decree Confirming Santa Rita Rancho.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the district court of the United States for the northern district of California, Greeting:

Whereas lately, in the district court of the United States for the northern district of California, before you, in a cause between John Yontz, administrator of Jose Dolores Pacheco, appellant, and the United States, appellees, *in* the decree of said district court was in the following words, viz: "This cause came on to be heard before a stated term of this court on appeal from the final decision of the commissioners to ascertain and settle the private land claims in the State of California under the act of Congress approved 3d March, 1851, upon the transcript of the proceedings and decision and the papers and evidence on which said decision was founded, and on additional testimony before this court, and counsel for both parties having appeared, whereupon it is hereby ordered, adjudged, and decreed that said decision of the said commissioners be in all things annulled and reversed; and it is hereby further ordered, adjudged, and decreed that the claim of appellant is valid to the land described in the boundaries mentioned in the grant, copy of which is on file in the transcript of the records and delineated in a map or plan annexed to the expediente and refer-ed to in the said grant, to the extent of two square leagues (sitios), if such quantity be contained within such boundaries; and in case there be less than said quantity of two square leagues within said boundaries, then the
549 claim of said appellee to said less quantity is hereby adjudged and decreed to be valid," as by the inspection of the transcript of the record of the said district court, which was brought into

the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully — at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and fifty-nine, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed.

12TH MARCH.

You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-nine.

Taxed by—

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

(Endorsed:) Filed Oct. 20, 1860. W. H. Chevers, clerk.

I, Southard Hoffman, clerk of the district court of the
550 United States for the northern district of California, do hereby certify the foregoing to be a full, true, & correct copy of the mandate Supreme Court United States in the cause entitled Pacheco's Adm'r *vs.* United States, now on file and of record in my office.

Attest my hand and seal of said district court this 18th
[L. S.] day of March, A. D. 1887.

SOUTHARD HOFFMAN, *Clerk.*

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S.
vs. } No. 3106.
CURTNER.

RESPONDENT'S EXHIBIT 50. S. C. H., Examiner.

UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 6th*, 1887.

Pursuant to section 882 of the Revised Statutes I hereby certify that the annexed is a true copy of a letter of record in this department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

H. L. MULDROW,
Acting Secretary of the Interior.

Letter of Sec'ty of Interior to Att'y Gen'l Requesting Suit to be Brought.

WASHINGTON, *6th December*, 1882.

The Honorable the Attorney General of the United States.

SIR: On the 18th of July, 1881, my immediate predecessor, Mr. Secretary Kirkwood, asked the opinion of the then Attorney
551 General as to the authority of this department to issue patents to the Central Pacific Railroad Company for certain lands in the San Francisco district, California, which had already been approved to the State of California. Under date of the third of July last the Acting Attorney General, the Honorable S. F. Philips, rendered an opinion that this department had no such authority. Adopting this opinion, I directed the Commissioner of the General Land Office on the 18th of October last to prepare the evidence showing the superior right of said railroad company to the lands in question. He has done so, and I transmit herewith copy of his letter to me of the 2d inst. and the accompanying papers. I have the honor to request that you will, if in your judgment the facts warrant such a course, cause legal proceedings to be instituted in the proper court to set aside the title of the State of California to the lands described in the papers herewith.

You will notice, and act as you may deem proper on the suggestion of the Commissioner's letter, that in view of the fact that one half section of the lands in question has been patented to one Felix G. Coates it may be necessary to make him a defendant in the action requested.

Very respectfully, H. M. TELLER, *Secretary.*

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

552 U. S. Circuit Court, Dist of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 51. S. C. H., Examiner.

Letter of Att'y Gen'l Directing Suit to be Brought.

DEPARTMENT OF JUSTICE,
WASHINGTON, *February 21st*, 1883.

S. G. Hilborn, Esq., United States district attorney, San Francisco, California.

SIR: I enclose herewith copy of a letter of the 6th of December

last from the Secretary of the Interior and the papers and documents accompanying the same.

The Secretary requests that I will cause legal proceedings to be instituted "to set aside the title of the State of California to the lands described in the papers" which he transmits with his letter, "if in my judgment the facts warrant such a course."

Complying with the Secretary's request, I hereby direct you to prepare and file pleadings in the circuit court of the United States for the district of California, the purpose of which shall be to extinguish the title of the State of California to the said lands and the titles derived from the State. In so instructing you I do not undertake to decide whether the Central Pacific R. R. Company or the State of California has the better right to the lands, but the facts set forth by the Commissioner of the General Land Office, at the request of the Secretary, raise the question which I think should be judicially determined; and this can only be through proceedings instituted by the Government.

You will draft the bill or bills in equity in my name, as Attorney General in behalf of the United States, and you are authorized to sign my name thereto.

This letter of instruction has been delayed to give the pur-
553 chasers from the State opportunity to oppose the application.

I send herewith their brief, that you may be apprized of the "points" they take in opposition to the proceeding.

You will note the observation of the Secretary in reference to the patent issued to Felix J. Coates, and, if necessary, you will make him a party to the suit.

Very respectfully,

BREWSTER,
Attorney General.

We hereby stipulate and agree that the annexed and foregoing is a true and correct copy of the original letter of Att'y General Brewster now on file in the office of the U. S. district attorney in San Francisco.

Dated M'ch 21st, 1887.

SHAFTER, PARKER & WATERMAN,
For Complainant.

H. F. CRANE, *For Defendants.*

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 52. S. C. H., Examiner.

Bond of Wm. B. Carr Exhonerating the U. S. Against all Costs & Expenses of Suit.

Know all men by these presents that I, William B. Carr, of the

city and county of San Francisco, State of California, as principal, and S. P. Smith and D. Henshaw Ward, of the same place, as sureties, are held and firmly bound to the United States of America in the full and just sum of five hundred ($500.00) dollars, lawful money of the United States of America, to be paid to the said United States of America; to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

554 Sealed with our seals and dated the 20th day of July, 1883.

The condition of this obligation is such that whereas the Attorney General of the United States of America is about to file in the circuit court of the 9th circuit of the United States of America for the district of California, at the request of the above-named William B. Carr, a bill in equity in the name of and on behalf of said United States of America against the State of California, Henry Curtner, Samuel Davis, *et als.*, defendants, to procure the recall, cancellation, and annulment of the listings by the United States of America to the State of California of certain lands in the counties of Alameda and Contra Costa and State of California claimed to have — wrongfully listed to said State through inadvertence & mistake, as fully set forth in said bill:

Now, therefore, if the said William B. Carr shall well and truly save the said United States of America harmless from all costs and expenses which may be incurred by or against them in the prosecution of said suit to its final determination and pay or cause to be paid on demand all such costs and expenses as may be necessarily incurred in such prosecution, then this obligation to be void; otherwise to remain in full force and effect.

(S'g'd) WM. B. CARR.
" S. P. SMITH.
" D. HENSHAW WARD.

Signed, sealed, & delivered in presence of—
JAMES L. KING.

STATE OF CALIFORNIA, }
City & County of Alameda, } *ss:*

S. P. Smith and D. Henshaw Ward, whose names are sub-

555 scribed to the above bond as sureties, being severally duly sworn, each for himself says that he is a resident and freeholder of the State of California and worth the sum in said foregoing bond specified as the penalty thereof over and above his just debts and liabilities, exclusive of property exempt from execution.

(S'g'd) S. P. SMITH.
" D. HENSHAW WARD.

Subscribed and sworn to before me this 20th day of July, 1883.
[L. S.] JAMES L. KING,
Notary Public.

(Endorsed:) Filed July 23d, 1883. L. S. B. Sawyer, clerk.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, & correct copy of a bond filed July 23d, 1883, in the cause entitled The United States *vs.* The State of California *et al.* (now The United States *vs.* Henry Curtner *et al.*), No. 3106 in said circuit court.

Attest my hand and seal of said circuit court this 21st day of March, A. D. 1887.

[SEAL.] L. S. B. SAWYER, *Clerk.*
F. D. MONCKTON, *Dep. Cl'k.*

(Endorsed:) Filed July 26, 1883. L. S. B. Sawyer, clerk.

556 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT "53." S. C. H., Examiner.

Deed of Sam'l B. Martin to J. West Martin for Sec. 13 *& Other Land.*

This indenture, made the fourteenth day of January, in the year of our Lord one thousand eight hundred eighty-two, between Samuel B. Martin, of the county of Alameda, State of California, the party of the first part, and J. West Martin, of the county and State aforesaid, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of twenty thousand ($20,000) dollars, in gold coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the said party of the second part and to his heirs and assigns forever all those certain lots, pieces, or parcels of land situate, lying, and being in the county of Contra Costa, State of California, and bounded and particularly described as follows, to wit:

The east half and the southwest quarter and the west half of the northwest quarter of section twelve (12), containing 560 acres of land; also the whole of section thirteen (13), containing 640 acres of land; also the south half of section eleven (11), containing three hundred and twenty (320) acres of land, all of said tracts of land lying and being in township two (2) south, range one (1) east, Mount Diablo base and merid-an, containing in the aggregate fifteen hundred and twenty acres (1,520) of land—

Together with all and singular the tenements, heriditiments, and appurtenances thereunto belonging or in anywise appertain-
557 ing, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; to have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day & year first above written.

SAM'L B. MARTIN. [SEAL.]

Signed, sealed, & delivered in the presence of—
CHAS. E. KELLEY.

STATE OF CALIFORNIA, }
City & County of San Francisco, } *ss:*

On the 14th day of January, one thousand eight hundred and eighty-two, before me, Chas. E. Kelly, a notary public in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared Sam'l B. Martin, known to me to be the person described in, whose name is subscribed to, and who executed the within instrument, and he duly acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and [SEAL.] affixed my official seal, at my office, in the city & county of San Francisco, the day & year first above written.

CHAS. E. KELLY,
Notary Public, 216 *Sansome St.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

558 On the 14th day of January, A. D. one thousand eight hundred and eighty-two, before me, Chas. E. Kelley, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Samuel B. Martin, known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument, and he acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city & county of San Francisco, the day and year above written.

[L. S.]

CHAS. E. KELLEY,
Notary Public, 216 *Sansome Street.*

(Endorsed:) Filed July 26th, 1887. L. S. B. Sawyer.

559 U. S. Circuit Court, Dist. of Cal.

U. S. *v.* CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 54. S. C. H., Examiner.

Letter to Commission'r Relative to Lands in T'p 2 S., R. 1 E., Mt. D. Md.

SAN FRANCISCO, *May 25th,* 1878.

Hon. J. A. Williamson, Commissioner General Land Office, Washington, D. C.

DEAR SIR: Herewith I send a plat showing the different surveys

of the Mexican land grant Las Pocitas, situate in the counties of Alameda and Contra Costa, State of California. The plat shows the "Lewis survey," made in 1854, containing between four and five leagues; the Dyer survey, made in 1865, containing between nine and ten leagues, and the final survey, containing two leagues. The plat also shows the location of the natural objects called for in the expediente. The same natural objects are called for in the decree of the United States district court. The following is the decree of the United States district court, dated San Francisco, Cal., Feb'y 18, 1859:

"The land of which confirmation is hereby made is known as 'Las Pocitas,' and is bounded and described as follows, to wit: On the north by the 'Lomas de las Cuevas;' on the east by the 'Sierra de Buenos Ayres;' on the south by the dividing line of the establishment of San José, and on the west by the rancho of 'Don Jose Dolores Pacheco,' containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed; reference for further description to be had to the map marked 'C,' filed in this case."

(Signed) OGDEN HOFFMAN,
U. S. District Judge.

In this decree the exterior boundaries of the grant are
560 fixed and named the "Lomas de las Cuevas" and the "Sierra de Buenos Ayres;" are permanent, unmistakeable, and well-known natural objects that will last forever. The "Lomas de las Cuevas," the boundary on the north called for in the decree, is a range of hills named after the caves in the S. W. ¼ of section 7, T. 2 S., R. 3 E., Mt. D. Md. The "Sierra de Buenos Ayres," the boundary called for on the east, commence south of the Corral Hollow Pass. Corral Hollow Pass pas-es through the centre of section 26, T. 3 S., R. 3 E., Mt. D. Md. The rancho of Don Jose Dolores Pacheco—the boundary called for on the west is the Tasajara creek. In order that you may be able to form an idea of the western boundary of the grant Los Pocitas we give a copy of the boundaries from the expediente of the rancho of Don Jose Dolores Pacheco. It is as follows, to wit: Don Dolores Pacheco is declared owner of the property of the place lying between the creek or ravine of "La Tasajara" and the place of San Ramon, bounded by the house — the same place of San Ramon down to the "dead trees" (Palos Secos), and from this point, taking the Tulare to the "High Hills" (Loma Alta), along the said — or ravine of La Tasajara and along the range of hills (sierra) and the tract of citizen Bartolo Pacheco, as it is shown in the sketch, running with this expediente and under the conditions mentioned in the title.

The grant of Bartolo Pacheo, referred to in the description of the grant of Don Jose Dolores Pacheco, adjoins the grant of San Ramon, confirmed to Jose Maria Amador, on the north and is west of the Tasajara creek.

The immediate purpose of the grantees of the State to lands

in T. 2 S., R. 1 E., M. D. M., is to show or be permitted an
561 opportunity of showing that these lands lie within the exterior boundaries of the Mexican grant Los Pocitas and were held and claimed under that grant, and therefor-, under the decision of the Supreme Court of the United States in Newhall *vs.* Sanger, 2 Otto, 761, none of these lands so situated passed under the railroad grant. The parties that are now asking for a rehearing have been in actual occupation of these lands for about fifteen years and upon which they have valuable improvements, — complain that your decision fixing upon the "Lewis survey" as the exterior boundary of the grant Los Pocitas was and is wholly *ex parte;* that they never had an opportunity of being heard upon this question, and they now respectfully ask that they may be heard, and that a rehearing may be ordered for that purpose.

The plat *was* made by Mr. La Croze and sent herewith shows the location of the "Lomas de las Cuevas," the "Sierra de Buenos Ayres," and the Tasajara creek, three of the principal points constituting the exterior boundaries of the grant "Las Pocitas."

If it be conceeded that these points are correctly delineated and marked upon the plat, it then follows that the "Lewis survey" does not in any manner define such exterior boundaries. The "Lewis survey" of the grant Las Pocitas was made near five years anterior to the time that the United States district court rendered its decree fixing the exterior boundaries of the grant "Las Pocitas." We have failed to find that any reference is made in any manner by the decree to the Lewis survey. If the court had been satisfied that the "Lewis survey" extended to and embraced all the land in the exterior boundaries of the grant Los Pocitas it would have
562 so declared it, as the court tried the case on testimony of witnesses and documentary evidence.

No question was ever made and it was never disputed that the land embraced in the survey made by Dyer in 1865 was all within the exterior boundaries of the grant Los Pocitas. The only question was as to quantity of land to which the grantees were entitled *to* within the larger tract. The plat shows that the "Dyer survey" of 1865, embracing nine or ten leagues, is wholly within the exterior boundaries.

The said Dyer survey was approved by the surveyor general of California and remained so approved until 1868—a period of about three years. This should serve to make it clear that this survey is within the exterior boundaries of the grant Las Pocitas. A mere inspection of this plat and these three surveys and the general topography ought to be sufficient to show the utter absurdity of the adoption of the Lewis survey as marking the exterior boundaries of this grant. In fact, the final official survey upon which the patent of Los Pocitas was issued embraces land outside of the "Lewis survey."

As a matter of fact, the exterior boundaries of the grant Las Pocitas embrace all the remaining east part of T. 2 S., R. 1 E., M. D. M., not embraced by surveys of Mexican grants; all of T. 2 S., R. 2 E., Mt. D. Md., lying west of the Lomas de las Cuevas; all of

T. 3 S., R. 3 E., M. D. Md., lying west of *of* the range of hills that connect with the "Sierra de Buenos Ayres; all of T'p 3 S., R. 2 E., Mt. D. Md., lying east of the surveyed boundaries of the grant El Valle de San Jose.

563 I also send the affidavit of Hiram Bailey, and old and respected citizen, who has lived many years on this grant and who is a part owner of the same. Mr. Bailey is perfectly familiar with the objects and places called for in the expediente, and the decree of the United States district court, that mark the exterior boundaries of the grant, Las Pocitas. I also send the affidavit of Mr. John La Croze, a surveyor, who is familiar with the calls of the grant and who has made surveys of the adjoining Mexican grants, and who has been surveying lands in the locality of this grant for the last twenty-five years. I also send a pamphlet containing the decision of Judge McKee, of the 3d judicial district court for the county of Alameda, State of California, in the case of Hoff *vs.* Doyle, for land within the exterior boundaries of the grant Las Pocitas. This was an action brought by the holder of a lieu land selection or State title against a pre-emption settler. The court awarded the land to the holder of the State title. The case was appealed to the Supreme Court of the United States, which reaffirmed the decision of Judge McKee.

The following is one of the findings in said decision (see section XI, page- 21 and 22 of the pamphlet sent):

"That some time prior to the year 1860 one Robert Livermore had obtained the final confirmation to himself of that certain Mexican grant called 'Las Pocitas;' that the designation and description, as contained in the final decree of confirmation and which is contained in the original grant as to the calls thereof, is as follows, to wit: The land of which confirmation is hereby made is known as 'Las Pocitas,' and bound- and described as follows, to wit:

564 On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed."

That the area of land embraced by said boundaries is from ten to twelve square leagues of land, embracing the greater portion of the place known as the Livermore Valley, in Alameda county; that the land in controversy in this action is situated in the southern end of said valley, and is embraced in said exterior boundaries of said "Las Pocitas," as above given; that said Livermore in his lifetime used said land for grazing purposes, and claimed the same as a part of said rancho Las Pocitas until his death, which occurred in or about the year 1859, and that his heirs continued to use said land in the same manner after his death; that in the year 1865 the heirs and assigns of said Livermore, for the purpose of obtaining a United States patent under said decree of confirmation, procured a survey to be made by the surveyor general of the United States for the

State of California, which survey contained some nine leagues of land and included the land in contest; that said survey was duly approved by said surveyor general, but was afterwards, in the year 1868, rejected and set aside by the Commissioner of the General Land Office and Secretary of the Interior of the United States, and a new survey directed to be made which should contain but two square leagues of land.

565 That in the month of March, 1869, in pursuance of said direction the said surveyor general made an official survey of said rancho, constructed the same into a plat, and on the 11th day of May, 1870, approved said plat and survey, which contained about two leagues of land and did not embrace the land in contest; that the heirs and assigns of said Livermore appealed from the action of the surveyor general in making said two leagues' survey, and on such appeal said survey was confirmed by the Commissioner of the General Land Office and Secretary of the Interior of the United States, and on the 6th day of June, 1871, said survey became final, and a patent was issued thereon to said claimants of the Las Pocitas for said two leagues and which they have since held, and said patent does not embrace any portion of the land in contest in this action."

It is confidently anticipated that with the showing which the parties in interest have made in this matter you will not deem it improper that they be heard, and to the end that justice may be done the issuance of further patents to the railroad company on this tract to be suspended, and a rehearing ordered, in which all parties in interest may have an opportunity to be heard in this matter.

Yours respectfully, WM. D. ENGLISH,

On Behalf of Himself and Co-owners of the Title to State of California to said Land Involved in this Matter, and as

566 *One of the Attorneys for the State of California in this Matter.*

N. 45, C. 4., D. F. B.

(Endorsed :) U. S. land office, San Francisco, Cal. In the matter of the exterior boundaries of the Rancho Las Pocitas, asking a rehearing. Application for rehearing by State of Cala. in the matter of the application of C. P. R. R. Co. to select certain lands in T. 2 S., R. 1 E. Decided by Com'r on March 9th, 1878. "F." Filed May 25. 1878. W. R. Wheaton, register.

Affidavit of John La Croze Relative to Boundaries of Las Pocitas.

In the Matter of the Exterior Boundaries of the Mexican Grant Las Pocitas.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss.*

John La Croze, being first duly sworn, upon his oath doth depose and say as follows, to wit: My name is John La Croze; I am a citizen of the United States, and over twenty-one years of age; I am a

resident of the city & county of San Francisco; I am and for the past twenty-six years have been a practical land surveyor in the State of California, being a portion of the time acting as a United States deputy surveyor in said State, surveying public lands and Mexican land grants. I have known the Mexican land grant Las Pocitas, located in the counties of Alameda and Contra Costa, in said State of California, since the year 1853, and since that date no year has elapsed that I have not been upon some portion of said grant. In 1854 I made a preliminary survey of the San
567 Ramon rancho. I then became familiar with the boundaries of the adjoining Mexican grants.

As a United States deputy surveyor, I surveyed, under instructions from the surveyor general of the United States in and for the State of California, as early as 1860 the ranchos of San Ramon el Valle de San Jose and Santa Rita, the latter being the rancho of Don Jose Dolores Pacheco, called for as the west boundary of the Rancho Los Pocitas.

In my capacity of United States deputy surveyor it became necessary for me to ascertain, and I did ascertain, the exterior boundaries of the adjoining ranchos, and thus I became familiar with the exterior boundaries of the Rancho Las Pocitas and the natural objects mentioned in the grant and the decree of confirmation as constituting its exterior boundaries.

I am familiar with the survey made in 1854 by W. J. Lewis, and known as the "Lewis survey," of the Los Pocitas.

I know of my own knowledge that this "Lewis survey" does not embrace more than one-third of the land within the exterior boundaries of the Las Pocitas, as the same are given in the grant itself and in the decree confirming the same, and such Lewis survey is not within a mile and a half at any point of the exterior boundaries of said rancho, except on the northeast boundary of the Rancho el Valle de San Jose, which is an agreed line of division.

The "Lomas de las Cuevas," the boundary called for on the north, is a range of hills named after the caves situate in the south-
568 west quarter of section 7, T. 2 S., R. 3 E., M. D. M., and tend northerly to the Sierra Golgones, which connect with Mt. Diablo.

The "Corral Hollow Pass" is near the centre of section 26, T. 3 S., R. 3 E., Mt. D. Md. The "Sierra de Buenos Ayres," the boundary called for on the east, commences south of the "Corral Hollow Pass" and tend- southerly.

The rancho of Don Jose Dolores Pacheco, the boundary called for on the west, is the Tassajara creek, the Tassajara creek having been fixed by the decree of the United States district court as the east boundary of said rancho of Pacheco.

Some of the calls of the Las Pocitas grant are unmistakeable natural objects well known to the native and early settlers of the Livermore Valley, which at the present time can be readily identified and located upon the ground by numerous and reliable witnesses.

JNO. LA CROZE.

Subscribed and sworn to before me this 24th day of May, A. D. 1878.

[L. S.] ANDREW J. COFFEE,
Notary Public.

(Endorsed:) N. 45, C. 4, C. T. 8. In the matter of the exterior boundaries of Las Pocitas. Affidavit of John Las Croze. It is hereby stipulated and agreed that the three foregoing documents are true and correct copies of the original documents on file in the Land Department at Washington, D. C. Shafter, Parker and Waterman, for complainants.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

569 U. S. Circuit Court, Dist. of Cal.

U. S.
v.
CURTNER. } No. 3106.

RESPONDENT'S EXHIBIT 55. S. C. H., Examiner.

Letter of Court in Reference to Recognition of Map of Feb'y 1st, 1870, as Showing Definite Location of Line.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, *May* 6, 1870.

Register and receiver, San Francisco, Calif'a.

GENTLEMEN: The Western Pacific Railroad Company having filed a map of definite location of their line of route, I herewith transmit a diagram of said line, with the 20-mile limits of the land grant within your district, and you will be governed by this limit in the adjustment of the grant. The additional odd-numbered sections which may be brought within the limits as now indicated and not heretofore withdrawn for the road you will consider as withdrawn on account of the grant, and the additional even-numbered sections increased to $2.50 per acre from the date of receipt of this letter, said lands being indicated in list A herewith.

All the lands heretofore withdrawn on account of the grant and now falling outside of the limits designated on the accompanying diagram will be restored to the public domain, and where heretofore offered will be subject to pre-emption, homestead, and private entry after due public notice; where, however, they have not been offered the restoration will be to pre-emption and homestead entry only.

I enclose, marked B, a list of the lands to be restored, in which is noted the townships containing offered lands, and you are directed to give notice by publication in two papers of general circu-
570 lation in your district that upon a day to be fixed by you, and not less than thirty days from date of first publication of notice, the tracts describing same, as per list, will, where here-

tofore offered, be restored to pre-emption, homestead, and private entry, and where not offered to pre-emption and homestead only.

This notice you will publish twice a week for four weeks, and the receiver, as disbursing agent, will pay for the same and charge in his disbursing account, transmitting as vouchers copy of notice, with publishers' certificate of publication and his receipt for payment. In meantime be pleased to forward copies of the papers containing the advertisement and acknowledge receipt of this letter.

Very respectfully, JOS. S. WILSON,
Commissioner.

(Endorsed:) Gen'l Land Office, May 6th, 1870. Restoration of lands. Ans. May 26, 1870. Filed May 23, 1870.

I hereby certify that the above is a full, true, & correct copy of the original letter of May 6, 1870, of Commissionor Wilson now on file in this office.

W. LEIGH,
Receiver of U. S. Land Office at San Francisco, Cal.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

COMPLAINANT'S EXHIBITS.

For Complainant's Exhibits B, D, V, W, D D, E E, F F, and K K see Vol. II.

DEFENDANTS' EXHIBITS.

For Defendants' Exhibits 1, 9, 25, 26, 29, 46, 47, 56, and Exhibit Hopkins see Vol. II.

tofore offered, be restored to pre-emption, homestead, and private entry, and where not offered to pre-emption and homestead only.

This notice you will publish twice a week for four weeks, and the receiver, as disbursing agent, will pay for the same and charge in his disbursing account, transmitting as vouchers copy of notice, with publishers' certificate of publication and his receipt for payment. In meantime be pleased to forward copies of the papers containing the advertisement and acknowledge receipt of this letter.

Very respectfully, JOS. S. WILSON,
Commissioner.

(Endorsed:) Gen'l Land Office, May 6th, 1870. Restoration of lands. Ans. May 26, 1870. Filed May 23, 1870.

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W. LEIGH,
Receiver of U. S. Land Office at San Francisco, Cal.

(Endorsed:) Filed July 26, 1887. L. S. B. Sawyer, clerk.

COMPLAINANT'S EXHIBITS.

For Complainant's Exhibits B, D, V, W, D D, E E, F F, and K K see Vol. II.

DEFENDANTS' EXHIBITS.

For Defendants' Exhibits 1, 9, 25, 26, 29, 46, 47, 56, and Exhibit Hopkins see Vol. II.

588 At a stated term, to wit, the February term, A. D. 1889, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 11th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable Lorenzo Sawyer, circuit judge; the Honorable George M. Sabin, U. S. district judge, district of Nevada.

Order Allowing Appeal.

THE UNITED STATES OF AMERICA
vs.
HENRY CURTNER *et al.* } N-. 3106.

On motion of H. F. Crane, Esq., solicitor for respondents herein, it is ordered that an appeal to the Supreme Court of the United States from the decree filed and entered herein on the fifth
589 day of March, 1889, be, and the same hereby is, allowed, and that a certified transcript of the pleadings, depositions, exhibits, evidence, stipulations, and proceedings be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the amount of the bond on appeal be fixed at five hundred dollars.

590 *Bond on Appeal.*

In the Supreme Court of the United States.

HENRY CURTNER, J. WEST MARTIN, THE BANK OF CALIFORNIA, a Corporation; Alfred E. Whitaker, Samuel B. Martin, W. D. English, George G. Taylor, Anna T. Taylor, Henry F. Crane, Le Grand Morehouse, Andrew S. Barron, Garrison Gerst, Franz Leberer, Charles G. Johnston, Rasmus H. Carstensen, Frances Schweer, John Hinkle, Thomas W. Moore, John R. Deardorff, Margaret Armstrong, Patrick Armstrong, and F. S. Wensinger, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellees.

Know all men by these presents that we, Socrates Huff and Ralph W. Kirkham, are held and firmly bound unto The United States of America, the above-named appellees, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Dated the 27th day of April, 1889.

591 The condition of this obligation is such that whereas said Henry Curtner, J. West Martin, The Bank of California, a

corporation; Alfred E. Whitaker, Samuel B. Martin, W. D. English, George G. Taylor, Anna T. Taylor, Henry F. Crane, Le Grand Morehouse, Andrew S. Barron, Garrison Gerst, Franz Leberer, Charles G. Johnston, Rasmus H. Carstensen, Frances Schwer, John Hinkle, Thomas W. Moore, John R. Deardorff, Margaret Armstrong, Patrick Armstrong, and F. S. Wensinger, appellants, have taken an appeal to the Supreme Court of the United States to reverse the decree filed and entered by the circuit court of the United States of America of the ninth judicial circuit, northern — of California, in the suit entitled The United States of America, complainants, *versus* Henry Curtner and others, respondents, No. 3106; which said decree was filed and entered in said circuit court on the 5th day of March, 1889:

Now, therefore, if the above-named Henry Curtner, J. West Martin, The Bank of California, a corporation; Alfred E. Whitaker, Samuel B. Martin, W. D. English, George G. Taylor, Anna T. Taylor, Henry F. Crane, Le Grand Morehouse, Andrew S. Barron, Garrison Gerst, Franz Leberer, Charles G. Johnston, Rasmus H. Carstensen, Frances Schweer, John Hinkle, Thomas W. Moore, John R. Deardorff, Margaret Armstrong, Patrick Armstrong, and F. S. Wensinger shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

SOCRATES HUFF.
RALPH W. KIRKHAM.

Signed, sealed, and delivered in presince of—
NEWTON BENEDICT.

592 UNITED STATES OF AMERICA, *Northern District of California,* } *ss:*

Socrates Huff and Ralph W. Kirkham, being duly sworn, each for himself says that he is a householder within said district, and that he is worth the sum of five hundred dollars, exclusive of property exempt from execution and over and above all just debts and liabilities.

SOCRATES HUFF.
RALPH W. KIRKHAM.

Subscribed & sworn to before me this 27th day of April, 1889.

NEWTON BENEDICT,
[L. S.] *Notary Public.*

(Endorsed:) "Bond on appeal." "The form of the within bond and the sufficiency of the sureties thereon are hereby approved." Lorenzo Sawyer, U. S. circuit judge. Filed April 29th, 1889. L. S. B. Sawyer, clerk.

593 *Stipulation Omitting Exhibits S, T, and U from Transcript.*

In the Circuit Court of the United States, Ninth Circuit, in and for the State of California.

UNITED STATES
v.
HENRY CURTNER *et als.* } No. 3106.

It is hereby stipulated and agreed by the parties, complainant and respondents, that the Complainant's Exhibits S, T, and U showed that the Western Pacific Railroad Company "disposed of" all the lands involved in this suit in the months of June and July, in the year 1867; that as said Exhibits S, T, & U are voluminous and embrace much other matter not pertinent to any issue in this suit, the same are omitted from this record on appeal herein, and this stipulation is substituted in lieu of the same.

JOHN T. CAREY,
United States Attorney, Solicitor for Complainants.
SHAFTER, PARKER & WATERMAN AND
J. W. HARDING, *Of Counsel.*
H. F. CRANE, *Solicitor for Respondents.*

Endorsed: Filed August 28th, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

594 *Stipulation Omitting Certain Portions of Record from the Transcript on Appeal.*

In the Circuit Court of the United States, Ninth Circuit, in and for the State of California.

UNITED STATES, Complainant,
vs.
HENRY CURTNER *et als.*, Respondents. } No. 3106.

Stipulation omitting portions of record, &c.

It is hereby stipulated and agreed by and between the complainant and respondents as follows: That each and all the respondents named in the amended bill and in the decree of the court hereto annexed were served with process duly issued in this suit, and each entered his or her appearance herein, and that the demurrers to said amended bill and the amended answer hereto annexed are the demurrers and answer of each of said respondents.

And it is further hereby agreed that the said several documents and papers hereinafter named, with the date of their filing
595 herein respectively, may be omitted from the record of this cause on appeal to the Supreme Court, for the reason that they are voluminous and are not deemed material to a complete review and decision of said cause by said last-named court on appeal herein, viz:

1st. Complainant's original bill, filed herein on the 23d day of July, 1883.

2d. Subpœna and return, filed herein on the 27th day of November, 1883.

3d. Respondents' demurrers to said original bill, filed herein respectively on November 30th and December 3d, 1883.

4th. Order of court dismissing bill as to certain of the respondents, and that said demurrers be submitted to the court for decision, dated July 14, 1884.

5th. Order that complainant have leave to confess said demurrers and amend its bill.

6th. Answer of respondents to amended bill, filed herein March 9th, 1886.

7th. Answer of Alfred Whitaker and John R. Deardorff, filed herein March 10th, 1886.

8th. Answer of Garrison Gerst, filed herein on the 10th day of March, 1886.

11th. Answer of Patrick and Margaret Armstrong, filed herein March 10, 1886.

596 12. Amendment to answer, filed herein March 18, 1886.

13th. Replication of complainant, filed herein April 5th, 1886.

JOHN T. CAREY,
U. S. Attorney, Solicitor for Complainants.
SHAFTER, PARKER & WATERMAN AND
J. W. HARDING, *Of Counsel.*
H. F. CRANE, *Solicitor for Respondents.*

Endorsed: Filed Sept. 2, 1889. L. S. B. Sawyer, clerk.

597 *Stipulation as to Exhibit "E E."*

In the U. S. Circuit Court, Ninth Circuit, California.

UNITED STATES, Complainants,
vs.
HENRY CURTNER *et al.*, Respondents.

It is hereby agreed that the paper entitled "portion of Prof. Whitney's geological and topographical map," referred to in the testimony of witness Wilde, known as Complainant's Exhibit "E E," which exhibit is on file in clerk's office, may be certified by the clerk of this court as a part of the record herein on appeal in lieu of the entire map constituting said Exhibit "E E."

September 25th, 1889.

SHAFTER, PARKER & WATERMAN AND
J. W. HARDING, *Of Counsel for Complainants.*
H. F. CRANE, *Solicitor for Respondents.*

Endorsed: Filed Sept. 25, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

598 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Northern District of California.

THE UNITED STATES OF AMERICA
vs.
HENRY CURTNER *et al.* } N-. 3106.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, do hereby certify that the foregoing five hundred and ninety-seven written and printed pages, including map exhibits contained in volume 1 and volume 2 respectively, are a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, except certain original pleadings and exhibits omitted by stipulation of counsel, and that the same together constitute the transcript on appeal to the Supreme Court of the United States therein.

599 Seal U. S. Circuit Court, Northern Dist. Cal.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 1st day of October, A. D. 1889.

L. S. B. SAWYER, *Clerk.*

600 UNITED STATES OF AMERICA, *ss:*

To The United States of America and John T. Carey, Esq., United States attorney for the northern district of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1889, pursuant to an order allowing an appeal from the final decree of the circuit court of the United States of America in and for the northern district of California, wherein Henry Curtner, J. West Martin, The Bank of California, a corporation; Alfred E. Whitaker, Samuel B. Martin, W. D. English, George G. Taylor, Anna T. Taylor, Henry F. Crane, Le Grand Morehouse, Andrew S. Barron, Garrison Gerst, Franz Lebrer, Charles G. Johnston, Rasmus H. Carstensen, Frances Schweer, John Hinckle, Thomas W. Moore, John R. Deardoff, Margaret Armstrong, Patrick Armstrong, and F. S. Wensinger are appellants and The United States of America are appellees, to show cause, if any there be, why the said decree in the said cause mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, this 29th day of April, A. D. 1889, and of the Independence of the United States the one hundred and thirteenth.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

601 [Endorsed:] Original. No. 3106. In the Supreme Court of the United States. Henry Curtner *et al.*, appellants, *vs.* The United States of America, appellees. Citation. Filed April 29, 1889. L. S. B. Sawyer, clerk.

Due service of the within citation is hereby admitted on this the 29th day of April, A. D. 1889.

JOHN T. CAREY,
U. S. Att'y, N. D. Cala.

J. W. HARDING &
SHAFTER, PARKER & WATERMAN, *Of Counsel.*

Endorsed on cover: N. California C. C. U. S. No. 1045. Henry Curtner, J. West Martin, The Bank of California, Alfred E. Whitaker, *et al.*, appellants, *vs.* The United States. Filed October 22, 1889.

149 U.S. 662

Vol. II.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1045~~. 596 258

HENRY CURTNER, J. WEST MARTIN, THE BANK OF CALIFORNIA, ALFRED E. WHITAKER, ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 22, 1889.

1491 2682

Office Supreme Court U.
FILED.
MAR 10 1893
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 258.

HENRY CURTNER ET AL., APPELLANTS,

vs.

THE UNITED STATES, APPELLEES.

ARGUMENT FOR APPELLANTS.

HENRY F. CRANE,
Solicitor for Appellants.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1892.

THE UNITED STATES OF AMERICA,
Appellee,

vs.

HENRY CURTNER, AND OTHERS,
Appellants.

ARGUMENT OF DEFENDANT'S ON DEMURRER TO AMENDED BILL.

STATEMENT OF FACTS SHOWN BY AMENDED BILL.

The bill is endorsed and filed as a bill in equity.

From pages 1 to 20 it snows the following facts, viz: that the suit is brought, conducted and prosecuted by certain grantees of the Central Pacific railroad company for their own personal use and benefit and through and by their own attor-

neys and solicitors, viz: Messrs Shafter, Parker & Waterman. (See also pages 143 to 147.)

That the suit is bassed wholly and entirely upon the asserted claims of these grantees of the railroad company to the land described in the bill, and that the sole complainant is "*The United States of America.*"

That the subject matter of the bill concerns the listing by the Commissioner of the General Land Office by certain certified lists dated respectively September 8th, 1870; March 11th, 1871; November 15th, 1871, and March 24th 1873, of about 2880 acres of the public lands, situate in two certain townships, in Alameda and Contra Costa Counties, California, to the State of California, and the patenting of said lands by the State in divers tracts severally to the grantors of the defendants.

The relief prayed for, is, that such listings be set aside, canceled and annulled, that said land be declared public land of the United States, subject to the claims of the railroad company, its grantees and assigns.

It further appears by the bill that said lands are portions of odd numbered sections and are situate within ten miles from the line of said railroad.

It is averred in the bill that the State of California had no valid claims to said lands and that the Commissioner of the General Land Office did on said dates, without right, and through error, inadvertence and mistake, wrongfully list said land to the State of California. Nothing is charged or stated in the bill tending to show either the *character of the claim of the State, when or how it originated or wherein such claim was defective or invalid.* No fact, statement or specification is contained in the bill tending to show wherein the error, inadvertence or mistake on the part of the Commissioner of the General Land Office consisted in certifying or listing these lands over to the State of California.

The bill does show by proper averment, that, by four several certified lists dated respectively September 8th, 1870; March 11th, 1871; November 15th, 1871, and March 24th, 1873, these lands were passed to the State by the proper officer of the United States. That the State afterwards passed this title by

its patent to certain persons named in the bill, and that before the commencement of this suit such title had passed by mesne conveyances from such patentees in separate tracts to each of the defendants herein severally. (Page 15, subdivision 26 to subdivision 27, page 16.)

There is not a word in the bill tending to show by way of statement, assertion or conclusion that the State of California by or through any of its officers or agents, or that any of its grantees, or any person whomsoever, were guilty of any fraud, misrepresentation or improper act or conduct in making or asserting its or their claim to these lands, or that any officer of the Land Department of the United States was at any time deceived, imposed upon or misled at all. So far as appears by the bill these officers, charged by the law with the approval of these State claims and the listing of these lands, had all the facts before them in 1870, 1871 and 1873, and knew exactly what they were doing, and no averment of the bill shows, or tends to show, that any error was committed by them, or that any defect existed in or about said claims of the State, or that any new or other facts have since been discovered or exist.

The bill does show by proper averment that on the 29th day of December, 1869, the railroad had been completed and accepted according to law (pages 11 and 13,) and on the 1st day of February, 1870, a map of the line of said railroad as definitely located, fixed and completed, was by said railroad company filed in the Department of the Interior, and has since remained a record in that office (see Amendment to Amended Bill, page 39;) and that at said last named date the line of said road was definitely fixed.

There is no averment of the bill tending to show that any act or thing has been done by, or on behalf of said railroad company or its grantees which has in any manner affected their claim since said last named date; that it remains the same now as it was on February 1st, 1870.

The bill further shows that no claim by or on behalf of said railroad company, or its grantees, to the land in question, was made by them or any of them until the 12th day of May, 1874, more than four years after the completion and acceptance of said railroad and the filing of said map, and more than one

year after the last of said four certified listings of the same land had been made to the State of California (page 14, paragraph 25.) On that date (May 12th, 1874) they caused a list of said lands to be presented at the office of the Register and Receiver viz: the Local Land Office of the United States, in San Francisco, with a request to these officers that they do certify among other things that the whole of said lands were surveyed public lands of the United States and within the limits of ten miles on each side of the said railroad, that there was no homestead, pre-emption, State or other valid claim to any portion of said land on file or of record in said office. Said officers refused to so certify because it appeared by their records that said lands had, as aforesaid, been listed and certified over to the State of California.

The bill further shows that said railroad company and its grantees then caused said list and request to be transmitted to the General Land Office in Washington, D. C., where they continued such ex parte matter from time to time until June 26th, 1879, more than five years, when on said date the Hon. Carl Schurz, then Secretary of the Interior, wrote an opinion in which he reached the conclusion that the railroad company had the better right to the land, but since the land had been listed to the State the Land Department of the United States had become *functus officio* as to such land.

It further appears by the bill that this ex parte proceeding was commenced and prosecuted by and on behalf of this railroad company and its grantees with the intent to induce the officers of the United States Land Department to ignore the claims of the State of California, the approval of such claims, and the listings of the land to the State by the proper officers of the United States in 1870, 1871 and 1873, and issue to the railroad company United States Patents for the same land.

It is not shown that any notice of any kind was given to the State or its grantees of the commencement or pendency of these ex parte proceedings in the Land Department, or that the State or these defendants, or their grantors appeared or were represented therein, or that any notice or demand concerning said land or the title thereto was at any time given or made

upon the grantees of the State, or the defendants, before this suit was commenced.

The bill avers that on the 25th of February, 1878, demand was made on the *State of California* for the relinquishment of its title to said land (page 19, subdivision 30); it also avers explicitly that long prior to said date the State had divested itself of all such title by patenting said lands to certain persons whose names are stated in the bill as the patentees (page 15, subdivision 26.)

The bill also avers in terms that subsequent to the issuance of said patents by the State of California to said patentees they did, prior to the commencement of this action, by valid mesne conveyances, duly executed and acknowledged, convey all their right, title and interest in and to said land to the defendants herein. (Page 16, folio 28.)

From the averments of the bill and from its silence in that behalf, it may be assumed that the State had, and made, some claim to these lands; that such claim was made and asserted in good faith and upon a claim of right on behalf of the State under the law; that such claim was duly examined by the proper officers and that all conflicting claims of record were at the time considered and in view of all these matters the claim of the State was preferred and approved and thereupon these certified lists of the land were made to the State. And that the primary purpose of this suit is to have heard, tried and determined the relative rights of the State and the railroad company in 1870, 1871 and 1873, to this land.

SPECIFICATION OF POINTS ON DEMURRER.

First. It is not shown by the bill that the complainant has any title or interest in the land or any such interest in the subject matter of the controversy as to entitle it to have or maintain this suit, and the bill does not state facts sufficient to justify the relief demanded, or any relief. And the bill shows no equity.

The Court takes judicial notice that the right of the State of California to any given tract of public land in said State arises

from, and is based upon some one of the Congressional grants to the State. By an inspection of these various grants it will be seen that with the exception of the grant of the swamp and overflowed lands, and the grant of the 16th and 36th Sections in each township, the right of the State to any specific tract under the grant, must have its inception and origin by the terms of the grant itself, by virtue of some *act of selection* by the State, and the right of the State relates to the date of such selection.

None of the lands mentioned in the bill belong to the above excepted class, viz: none of them are 16th or 36th Sections, or swamp and overflowed lands.

By the 8th Section of the Act of Congress of September 4th, 1841, (5 United States Statutes 453,) the State acquired 500,000 acres of the public lands in California, and it was therein provided that such lands were to be *selected* in such subdivisions and in such manner as the Legislature of the State shall direct.

By the Act of March 3d, 1853, Section 7, (10 United States Statutes, 244) provision is made for idemnity for 16th and 36th Sections, not in place (viz: lost to the State by reason of private claims) out of any other unappropriated public lands, *to be selected* by the proper authorities of the State, subject to the approval of the Secretary of the Interior.

By the 12th Section of the same Act, 72 sections were granted to the State for the use of a Seminary of Learning to *be selected* by the Governor or such person as he may designate.

By the 13th Section of the same Act ten entire sections are granted to the State to aid in the erection of public buildings. Such land to *be selected* by the Governor or such person as he may designate.

As to the 16th and 36th Sections, in place, the title passes by the grant as soon as township surveys and plats are made and approved.

As to the swamp and overflowed lands, title is perfected by segregation of such lands from the high land by survey and platting and patent by the United States to the State.

Hence it results that from the very nature of the lands des-

cribed in the bill, they are of that class required by the law to be selected by the State, such selections to be approved by the Secretary of the Interior and the land embraced therein to be listed to the State in order to perfect title to any given tract.

This proposition is demonstrated by the fact that these lands were listed to the State; this could not have been done unless such listing had been preceded by selection on the part of the State and the approval of such selections made as prescribed by law.

There being no charge in the bill against the State, or the act of any officer of the State, and nothing appearing to the contrary, it will be presumed that the State officials regularly performed every act prescribed by the law for them to perform in making selection of these lands and presenting such selections for approval, and listing of the land thereon.

It is obvious from the averments of the bill that the real and only parties in interest, as complainant, is the railroad company or its grantees.

It is also obviously an attempt by these parties to draw in question the validity of the *claims of the State* which were approved and upon which the lands were listed.

This is attempted to be done by setting up at great length and unnecessary detail, a prima facie right of the railroad company to the land, and challenging the claims of the State by asserting that such claims were invalid or were not valid claims, and that the Commissioner, through error, inadvertence and mistake, and wrongfully and without right, did list said lands, etc., and that said claims did not fall within any of the claims excepted from the operation of the railroad grant.

We submit that these are mere conclusions of law. The bill contains no specification or statement of fact upon which the Court can determine or form any opinion upon this most important and vital question, to-wit: the right of the State to these lands, or the nature of the claim of the State.

Unless these conclusions of the pleader are adopted by the Court as its conclusions, the Court cannot say whether the State or the railroad company had the better right, and cannot determine whether or not the Unites Stated is under any

obligation to the railroad company, or its grantees, to maintain this suit in their behalf.

The bill contains a general allegation of error on the part of the Commissioner of the General Land Office in listing the land, but there is no specification of particulars in which such error consists. There is no such degree of certainty in setting out the case as to enable the defendants, who are shown to be the remote grantees from the State, to ascertain the precise ground upon which the bill is filed, or upon which an attack is made upon the title under which they are holding the land.

The Court takes notice that the railroad grant of 1862, amended 1864, (12 Statutes 489, and 13 Statute 356) expressly excepts from its operation and effect all lands which may have been *sold, reserved or otherwise disposed of by the United States*, up to the time when the line of the road shall be definitely fixed.

This embraces all lands which might be disposed of under the Congressional grants to the State during that period. The State was never inhibited by any law or in any manner from continuing to make selections under these grants even within the forty mile area, until the line of the road became definitely fixed. That event we have seen by the bill, occured on the first day of February, 1870.

The lands were listed in 1870, 1871 and 1873, but this was the *last act* in the proceeding to perfect the title in the State. No defect or irregularity is pointed out concerning the listing; nothing is said at all concerning the selections by the State or the approval of such selections; nothing appearing to the contrary, such selections and approvals must be deemed to have been regular and valid, being official acts performed under the laws of the United States, and the State, and under the law acts which necessarily precede the listing of the land over to the State.

If the real contention be that the State presumed to make these selections after the line of the railroad had been definitely fixed, it was a most material fact to have been charged in the bill; but not having been so charged it is reasonable to conclude that it could not be done.

Hence we submit that whatever the character of the claim of the State may have been, or may be, or how or when it had its inception or origin, the bill is entirely silent, and the Court cannot determine judicially that the listings should be set aside. The grants to the State are much older than the railroad grant and the selections may antedate the railroad grant itself.

The approval of these claims of the State and the listing of these lands to the State, upon such claims, in part satisfaction of a Congressional grant, is of equal solemnity as the issuance of a patent to the State for the land.

It will be borne in mind, that however much is said in the bill about the rights of the railroad company, or its grantees, yet the very gist of the suit is to set aside the title which came from the United States to the State of California in 1870, 1871 and 1873, and which for more than ten years before this suit was commenced had stood as the only record of title to these lands, and had been received and regarded as good title by all persons, having the sanction of the State and general government, thereby imparting the utmost confidence as to the validity and legal effect thereof to all purchasers.

The Court will not set aside a record of title made by the United States, except upon a clear and particular statement of affirmative facts, which facts show beyond question that such title should be set aside, all inferences will be in favor of the validity of such title and, if upon any hypothesis consistent with the facts pleaded in the bill, such title may be good, it will not be set aside.

Suppose one of these defendants had settled on one of these tracts of land as a pre-emptor before any sign of a railroad line had been made on the ground or on paper, and in 1870, 1871, and 1873 he had received a patent of the United States for such tract, and had held the land under the patent until 1883, when the Attorney General permits suit to be brought against him in the name of the United States to vacate and set aside the patent at the instance and on behalf of the railroad company. Would it be sufficient to charge that such patentee had no claim, or no lawful claim when the patent issued, and that his case did not

fall within any exception to the railroad grant, and that the Commissioner of the General Land Office issued the patent without right, or by mistake, or inadvertence and wrongfully?

Here, as well as the case at bar, the Court knows judicially that the *rights* of such patentee depend upon matters anterior to the issuance of the patent, such as settlemement, improvement and residence, personal qualifications, etc., and if any defect existed affecting the validity of the patent such defect must be clearly pointed out and charged in the bill.

The vice of the pleading is not that the claim of the third party is not fully stated, but the main question, to-wit: the vacating and setting at naught a record title to land, is assumed to be made out by setting up a prima facie claim of a third party and making no statement of facts from which the Court can pass upon the validity or paramount equity of the title sought to be set aside. The very things intended to be drawn in question and litigated are wholly ignored by the bill.

Courts of Equity do not vacate and set aside a solemn record of title to land upon conclusions of law or such general statements and conclusions as are contained in this bill.

The issuance of the patent or other evidence of title by the government is in the hands of the patentee, or his grantee, itself evidence that each and every requirement of the law on his part has been performed, and that all proceedings leading up to such patent have been performed and that such proceedings are regular. In a suit to set aside such patent or record of title by the United States such inference is not overcome or affected by setting up facts showing a prima facie right in another, and charging that the first grantee had no lawful claim or such patent was issued by mistake or wrongfully.

This might be sufficient where the real parties in interest are complainants and claiming adversely to the defendants in a suit to procure a judicial determination of their respective rights or claims, but where the United States, or any third party, is seeking to cancel its or his own record of title to real property in equity, facts showing such right must be particularly stated and specified in the bill.

In the latter case such facts must be alleged concerning the title sought to be set aside as makes it clear to the Court that such patent or other evidence of title was made or issued either without authority of law or by reason of some fraud or deceit upon the part of the grantee.

1 Daniels, Ch. Pr. and Plead., 371.
The R. R. Co. vs. Att'y Gen'l, 118 U. S. 682.
Maxwell Land Grant Case, 121 U. S. 325, 381.
Iron Company vs. United States, 123 U. S. 307.
United States vs. Atherton, 102 U. S. 372.

The setting up of some claim of a third party to the same land is incidental and subordinate to the main question. The real question still recurs, viz: were these officers of the United States in 1870, 1871 and 1873, justified under the law and upon the facts in approving these claims and listing these lands over to the State? The same facts presented to such officers upon the hearing of the case by them, shauld be specifically stated in the bill.

Upon this question we submit this bill gives no information and throws no light; at best it leaves those questions in doubt and uncertainty. It fails entirely in making a clear case in favor of the complainant and hence, of itself, does not sustain the decree of the Court below or any deeree against these defendants and our demurrer should have been sustained and the bill dismissed upon this point alone.

In the case of the United States vs. San Jacinto Tin Company, 125 U. S. 286, it is said, "If it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

Here it plainly appears that the suit is brought for the sole benefit of third parties, and that the United States has no

pecuniary interest in the remedy sought. How can it be said that the United States is under any obligation to the parties for whose use the suit is prosecuted, where it clearly appears that the beneficiaries could, if they chose, bring a similar suit in their own names?

No fraud, wrong or imposition being charged, and nothing appearing to the contrary, it must be presumed that the steps taken by the State in making selection of the land and presenting the same for approval was in all things regular and valid. No issue is tendered by the bill upon either of these questions. In fact it stands admitted that the claim of State was made and presented in good faith and upon a claim of right, and in these respects stands upon the same footing as to the obligation of the United States with the claim of the railroad company.

We have heretofore shown that, under the law, this land could not have been listed to the State of California at all under the law of Congress, unless such listings had been preceded by selection, presentation and approval of such selection.

The listing alone is attempted to be challenged simply by calling the same wrongful and by mistake, etc., and by calling the State claim invalid and saying that the land did not fall within any exception contained in the railroad grant and that the railroad company was entitled to have the land. Still it is shown that by lists made in 1870, 1871 and 1873 the land was by the proper United States officer listed to the State, that the State accepted such title and patented the land to its purchasers in the usual course.

There being nothing in the bill to impeach the validity of the action of the State from first to last and the action of the State through its officers being prescribed entirely by law and nothing to the contrary being shown it must be presumed that all of such acts and proceedings were regular and valid.

Hence we submit that, upon the averments and silence of the bill it cannot be said that the United States is under an obligation to the railroad company or its grantees as against the State.

The acts of the federal officers in approving the claims and listing the land, stand upon the same footing. Their acts

were prescribed by law and until the contrary is *shown* by proper averment their acts are deemed to be regular and valid.

The acts of these officers are not impeached by mere assertion or the *ipse dixit* of a pleader.

Their official acts will be deemed regular and valid until facts are clearly specified and particularly stated showing them not to be so.

Hence if the Court is to decide this question of obligation from the bill, it will be seen that the bill fails to show any such obligation and that notwithstanding all the allegations of the bill, still the government may have been under obligations to the State instead of the railroad company.

All this talk about the obligation of the government to the railroad company or its grantees is mere assumption, for that depends upon the facts constituting the right of the State,such facts are carefully omitted to be shown. How then can it be determined that the government is not under an obligation to the State? It cannot be under an obligation to both the railroad company and the State and that matter cannot be properly determined upon a ex-parte showing by one party.

In the case above cited, viz: (San Jacinto case) the attention of the Court seems to have been particularly called to this question and it received unusual consideration, and many cases are cited and quotations made and it seems that in each case there was involved some element of fraud, imposition or unconscientious practice upon the government or its officials and it is said in the opinion that the right of the government "to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a Court of Justice for relief against an instrument obtained from him by fraud or deceit or any of those other practices which are admitted to justify a Court in granting relief; the Government must show that, like the private individual it has such an interest in the relief sought as entitles it to move in the matter."

The case at bar differs from the cases cited in the San Jacinto case. Here title has been acquired in good faith and

under a claim of right and no element of wrong, fraud or imposition and no mistake, inadvertence or error is shown.

So far as any averment in the bill, these titles were acquired by the State in good faith and upon a claim of right; this must be infered because no wrong or irregularity is charged as to any act required by the law to be performed by the State.

The Court knows that the State holds these Congressional grants of the public lands under which she has the right of selection of certain subdivisions of land until such grants are satisfied. That the State is limited as to the territorial area in making her selections by the boundary lines of the State only.

That the railroad company takes under its grant such of the odd numbered sections lying within twenty miles on each side the line of its road as have not been *sold or otherwise disposed of* under the laws of the United States when said line becomes definitely fixed.

The fact that the lands in question are odd numbered sections or parts of such section and were in February, 1870, brought within that twenty mile area, raises no presumption against the validity of the State claims.

The admitted facts upon the face of the bill that the State made some claim to the lands, and that such claim was recognized and approved, and the same lands were listed over to the State, and by the State received and patented to her purchasers, in the usual course prescribed by law would seem to imply that the State selected these lands long before any line or sign of the raitroad existed, and that such claims might have been valid claims and excepted from the operation of the railroad grant, notwithstanding the mere assertions of the pleader. We submit that the above is a fair presumption arising upon the face of the bill; at least it is a condition of affairs which may have existed in spite of and consistently with any well pleaded fact in the bill.

The substance of the bill upon these claims is that they were invalid; they were *no claims* because not valid; they were not excepted out of the railroad grant because not valid claims, not lawful claims.

The railroad grant itself provides that nothing contained therein shall *defeat or impair any valid claim* existing at the time the line of the road is definitely fixed.

Third Section, Act 1862.—Fourth Section, Act 1864.

Kansas Pacific Railway vs. *Danmeyer*, 113 U. S., 629.

We submit that the Court cannot from any fact properly pleaded in the bill, determine first, the question of the validity of these claims; and second, the question whether said lands were or were not properly listed to the State of California, and hence cannot determine the question of obligation of the government to maintain this suit, either of which proposition defeats this bill.

The opinion of the Court (Record page 52) shows that the case was tried, argued, submitted and decided by the Court upon affirmative issues of fact not tendered by the bill.

It would seem to be obvious upon the allegations of the bill that the suit is commenced and prosecuted solely and only to procure a judicial determination of the relative rights, estate and interest of certain private parties, in certain tracts of land, in the State of California, viz: these defendants and the grantees of the railroad company, formerly known as an action to quiet title. But in such suit it is necessary that the person in whom such rights, estate or interest is vested, should be the parties to the record.

The bill proceeds upon the theory that the legal title to the land passed to the State in 1870, 1871 and 1873 by virtue of said listing, while the equitable and better right thereto had vested in the railroad company; which equitable title has since vested in the grantees of the railroad company, and such legal title has passed to these defendants.

The State and the railroad company, no wrong being chargeable to the State, stand upon the same footing, each claiming the land in good faith upon mere questions of law and fact without any element of wrong, mistake or fraud. The United States has no shadow of interest in this controversy and equity, requires that the real parties in interest alone must litigate their own claims and pretensions in such cases.

There is no principle of law that has become better settled in equity than that the real party in interest, viz: the party or parties who have or claim to have some estate title or interest in the land, must be the parties complainants in such action.

The bill shows affirmatively that the United States does not have or claim to have any title, estate or interest in the land or the subject matter of the suit. And farther the bill shows no equity on behalf of the complainant, no wrong has been done the Government. It will be conceded that the Government was under an obligation either to the State of California or the railroad company, a prima facie case is set up on behalf of the railroad company, with a denial of the right of the State and upon this pleading the Court is asked to set aside and "extinguish the title of the State of California" (page 316.)

Nothing more is said about the real subject of the suit, viz: the title sought to be extinguished, except certain opinions of the Commissioner and Secretary of the Interior made in 1878 and 1879 to offset these opinions, the bill shows the acts of these officials to the contrary in 1870, 1871 and 1873 in approving the State claims and listing the land to the State; hence we submit that the complainant shows no title or interest in the subject in controversy and the bill shows no equity in the complainant or the railroad company or its grantees.

If this suit can be maintained upon the allegations of this bill, then every claimant, who by his own ex-parte statement, can make out a prima facie case of right in himself to a given tract of land, which land has been awarded and granted to another upon a bona claim of right; such claimant will be entitled to use the name of the United States as complainant in a suit to set aside the title of the latter upon a mere denial of his right or the assertion that his claim was invalid.

SECOND POINT.

These defendants are entitled to protection in this that they appear from the bill to be bona fide purchasers for value.

From the allegations of the bill it appears that the defendants some time prior to the commencement of this suit did each become a purchaser in good faith, severally of divers portions of said lands in the ordinary and usual course of dealing and there is no averment that said purchasers or either of them, had any notice or knowledge of any claim of said railroad company or its grantees, or of any defect in said title.

The bill alleges that on September 8th, 1870; March 11th, 1871; November 15th, 1871, and March 24th, 1873, by four certified lists, said land was listed over to the State of California; that upon such listing the lands in divers parcels, were patented by the State to divers persons in severalty, and that after the issuance of said patents and prior to this suit these patentees conveyed said land and that the defendant in this suit by valid mesne conveyances have become the purchasers of said lands in divers tracts; and hence they are made defendants in this suit.

This is a brief abstract as shown by the bill of transactions in the usual course of business among the people of this State, and elsewhere.

It relates to transactions covering a period of about ten or twelve years. From the date of the first listing to this suit was nearly thirteen years and from the last listing to the suit was over ten years.

No claim of any kind was made by the railroad company until more than four years after the completion of their road and more than a year after all the lands had been listed to the State. (Page 14, subdivision 25.)

This appears to have been not only an ex-parte but a secret star-chamber proceeding in which no notice was gievn to these defendants, their grantors or any person, no record or sign was permitted to remain in the local land office in California. (Page 17, subdivision 29.)

We propose to show from what is stated in the bill and from the very nature of the case, that there was nothing of record or not of record in the State of California for the period mentioned, viz: ten or twelve years, to show or in any way tend-

ing to show any claim of the railroad company to these lands or any of them.

It will doubtless be, as it has been, urged that these purchasers are chargeable with notice of the railroad grants; that the lands are parts of odd-numbered sections and situate within twenty miles of the line of the railroad as definitely fixed.

Suppose all this to be admitted, and that even after the claims of the State had been regulary approved and the lands listed over to the State and patented to its grantees, still, that the above facts are sufficient to put all purchasers upon inquiry, what would have been the result of such inquiry?

First. A careful inspection of the Acts of Congress of 1862 and 1864, known as the railroad grant, plainly shows that the railroad company did not take *all* the odd numbered sections, or parts of such sections, in said forty mile area across the State, viz: that divers claims were excepted from the operation of the grant; in fact that all such odd numbered sections or parts thereof, that may have been otherwise disposed of under the laws of the United States, for the disposal of public lands up to the time the line of the road should be definitely fixed were so excepted from the grant.

Second. They would have found that the land in question had been selected by the State by a virtue of a Congressional grant at a date prior to the time when the line of the road was definitely fixed; that such selection had been presented to and approved by the proper officers of the United States in accordance with law, and the land embraced therein listed over to the State, and the State had by its patent in due form, granted the land to its vendee; the rest was simply tracing the record of the County Recorder's office down to his proposed vendor.

All the above were and are matters of record, viz: the selections by the State, the approval of the same by the Secretary of the Interior, and the listing by the Commissioner of the General Land Office, are all of record in the office of the Register of the State Land Office. The patents and mesne conveyances are recorded in the County Recorder's Office.

Each step in the proceedings to perfect these titles, from the selection of the land down to and including the patent by the

State, is purely official, performed by the proper officers of the State and the proper officers of the United States. Hence the entire record of title is not only regular but bears on its face the stamp of official authority of the State and general government. Here the State and general government had given to all purchasers the solemn assurance that these titles were good and valid, and that no valid adverse claims exist and that these lands were excepted from and did not pass under the railroad grant. The road had been completed and accepted in December, 1869, and the map of definite location and completion, showing the railroad company's lands, was on file before any of the lands were listed to the State.

What more could be desired to inspire confidence in these titles? The lands are situate in counties bordering the bay of San Francisco and in close proximity to the city, and long prior to 1870 was thickly populated; more odd numbered sections and parts thereof fell within the exceptions in the railroad grant in these counties than passed to the railroad company.

Would the ex-parte proceeding by the railroad company in May, 1874, be notice to purchasers of the railroad claim? It does not appear that any purchases were made after that date; it does not appear that any purchaser had actual notice of this event. There is no law making such a proceeding constructive notice; the land department were *functus officio* and without jurisdiction, hence this could not have been constructive notice to purchasers, any more than ex-parte proceeding before a justice of the peace.

Upon this point, as well as others in the record, the Court below, without the suggestion of counsel, and without any allegation in the bill finds a justification for ruling adversely to the defendants in this, to-wit: He holds that the purchasers of lands situate in Township 2 S. R. 12 E. had, since June 10th, 1865, official record notice of the claim of the railroad company, for the reason that the plat of this Township on file in the United States Land Office in San Francisco, had endorsed upon it these words, "The odd numbered sections on this plat,

are granted to the Western Pacific Railroad. See letter of instruction dated December 23d, 1864."

The person who wrote these words on the plat ought to have inserted after the word "railroad" as follows: "*Except such as are, by the terms of the grant itself, excluded from its operation and effect.*

This endorsement bears no date; it does not appear when it was placed on the plat, nor by whom.

Second. It is no part of a plat and is not authenticated by the signature of any officer or of any person.

It was nothing more than a notice that this Township embraced land within the forty mile railroad grant limits and could not effect the terms of the grant itself, as to exceptions therein contained.

Our point is that with notice of the railroad grant and the location of the land, purchasers were justified in assuming that it fell within some of the exceptions contained in the grant, because the proper officers of the United States with all the facts before them, had approved the claim and listed the land to the State, and such title had not been challenged by the railroad company, and hence such lands were excepted from the railroad grant.

The Honorable Gentlemen who were from September 8th, 1870, to March 24th 1873, viz: the Secretary of the Interior and Commissioners of the General Land Office, and who had unquestioned authority, and were charged by law with the duty of either approving or rejecting these claims of the State and disposing of these lands, held and determined upon investigation by them that such State claims were valid, and under the law paramount and superior to that of the railroad company, and hence the record was made by them as shown.

The Honorable Gentlemen who occupied the same position from 1878 to 1882, who had no authority and were charged with no duty under the law relative to these claims of the State, or the disposal of these lands, entertained this ex-parte application of the railroad company, or its grantees, and in 1879, from six to nine years after the lands had been listed to the State and patented to its purchasers assumed to hear, try

and determine the relative rights of the State and the railroad company, and decide the same *de novo*.

Four years afterwards, in February, 1883, an Attorney General, in the person of Mr. Brewster, who, while admitting that he had no opinion or judgment as to the relative rights of the State or the railroad company to the land, yet permitted the real parties in interest to use the name of the United States as complainant in this suit against these defendants. (Pages 315, 316 and 317; also pages 143 to 147.)

The above will be found to be the character of this suit and from the averments of the bill no wrong or shadow of wrong is imputed to either the State, its patentees or their, or any of their grantees, near or remote; they all stand upon the averments of the bill as absolutely innocent parties, and we submit there is no pretext of any mistake or inadvertance of any kind about the matter; so far as appears these officials in 1870, 1871 and 1873 had all the facts before them the same as they have since existed and knew exactly what they were doing, and it is not shown that they erred upon any point or question of law, and there is nothing in the bill tending to show that the defendants knew or had any means of knowing by the exercise of ordinary diligence that the railroad company had, or made or intended to make any claim at the time of their purchases, or at any time.

Upon this record made by the State and the general government, and with no existing record of any adverse claim of the railroad company, or its grantees, these patentees and the defendants acquired their titles to this land and under such title they have held the unchallenged right and posession thereto for from ten to thirteen years, viz: to the date of the commencement of this suit, viz: July 23d, 1883.

Under these circumstances and at this late date, these defendants have been compelled to appear in this suit in the Federal Courts and assume the burden of litigating the rights of the State of California and the claim of the railroad company, and its grantees, to this land, with the United States as complainant and the champion of the claims of the railroad company, upon the sole charge that there was some honest, un-

specified mistake of some government official in listing the land at four different dates, from 1870 to 1873, in and about some matter of which these defendants had no knowledge and in which official proceeding had and could have had no part.

It is a case in which the defendants are innocent of any shadow of wrong. They are guilty of nothing except, that they did in good faith, each purchase a tract of this land in the usual course of business, paying the full market values therefor; soley by reason of there reliance upon the record of title made by the State and general government upon which we submit they had the right to rely.

Here then the compainant the, United States, acting, as only it can act, through and by its own officers, made this record of title; a title as regular on its face as could be made; a title equivalent to a patent from the general government and impliedly guaranteeing its validity to the public and the world; ten years later, during which period such title has passed into the hands of innocent purchasers, upon a pretext that its officers committed some mistake about the matter, permits a suit to be brought in its name, and calls upon its Courts to cancel this title and give the land to others.

We have no hesitation in suggesting that this is not only inequitable but an outrage upon common sense and common justice.

The contention on the part of the complainant amount to this, that a purchaser in good faith and for value of a title to land, which title came originally from the United States, under all the forms of law, and where all the proceedings appear regular and valid, and where such title has passed from one purchaser to another, for more than ten years, unchallanged by any person, having or claiming an adverse or conflicting title or interest, and where permanent improvements of unlimited value have been placed upon the land upon the assurance given by such titles; that in such a case the United States may have and maintain a suit in equity and have such title set aside and the land given to another with all such improvements and the fruits of years of labor upon the sole ground that ten or twenty years before, its own official committed some error or

mistake while acting in the line of his official duty concerning the disposition of the land.

In equale jure melior est conditio possidentis.

THIRD POINT.

It is further shown by the bill that at, and long prior to the commencement of this suit, any claim, right, title or interest which the railroad company or its grantees, had to the land in question, became barred and extinguished under the laws of the State of California as to these defendants by reason of the lapse of time, and also by reason of the adverse possession of the land by the defendants and their grantors under claim of right and title such as is shown in the bill; and that such claim could not be enforced either at law or in equity, by them or any one on their behalf in July, 1883, and for many years prior thereto.

From November 9th, 1870, until April 5th, 1873, as shown by the bill, 2447 $\frac{10}{100}$ acres of the land in question had been patented by the State of California to the persons mentioned in the bill. The residue, 320 acres, was by the State patented to one of such persons March 4th, 1878.

This suit was commenced July 23d, 1883, 12 years, 9 months and 14 days had elapsed since the first patent issued; 10 years, 3 months and 18 days had elapsed since the last patent of the first lot, and 5 years, 4 months and 19 days since the issue of the last named patent.

The rights of the railroad company and its grantees, to the land was as complete and perfect on the 1st day of February, 1870, as it has been since; the road had been completed and accepted, and the map of definite location filed. It is upon the claim which accrued to them on February 1st, 1870, that they now base this suit in 1883.

Section 738 of the Code of Procedure of California, is as follows: "An action may be brought by any person against

another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

It will be observed that this suit may be maintained with or without a perfect legal title; it only requires that the plaintiff have an *estate* or *interest* in the land, and it is not required that he have any possession of the land, actual or constructive.

This statute as above quoted, has been in force in its present form since January 1st, 1873, and hence furnished a complete means to the railroad company, or its grantees, to have had these claims judicially determined as against said State patentees after said last named date, and after the issuance of said patents respectively, and until such suit had become barred by the Statute of Limitations. According to the averments of the bill a cause of action arose in favor of the railroad company or its grantees, against the patentees of the State, or their grantees, under Section 738 of the Code, as to their right to 2447 $\frac{10}{100}$ acres of said land as early as April 5th, 1873. As to the residue, 320 acres, their cause of action arose as early at least as March 4th, 1878, the date of the issuance of the State patent for that tract of land.

Instead of availing themselves of this plain, proper, adequate and speedy remedy they chose of their own volition to seek redress by an ex parte proceeding in a tribunal that under the law had no power or authority to deal at all with the subject or to afford any relief whatever; of which they will be deemed to have had full knowledge.

Moore vs. Robbins, 96 U. S., 530.

Here, upon an ex-parte proceeding, they sought for over nine years to induce the principal officers of the Land Department of the United States to ignore the action of their predecessors in office; to stultify themseives by a violation of law by issuing patents for land to them which ten years before had been listed by official certified lists to the State of California in part satisfaction of a Congressional grant to the State.

Failing in this attempt, and finding that their claim had become barred and extinguished under the laws of the State of

California, by reason of the lapse of time, and the adverse holding of the grantees of the State, they procure the Attorney General by their own influence and that of the then Secretary of the Interior to have leave to prosecute this suit in the name of the United States, for their own personal use and benefit; hoping thereby to escape the effect of the law of the State.

The Code of Civil Procedure of the State of California, Sections 318 and 319, provides that no action can be brought, for the recovery of real property or for the possession thereof, or arising out of the title thereto, unless such action is commenced within five years after the cause of action shall have accrued.

Section 19, Statutes California for 1850, page 346, re-enacted as Section 343, Code of Civil Procedure, is as follows:

Section 343. "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

The above Section 343 of the Code of California is literally the same as Section 97 of the Code of New York, with the exception that in the latter Code the limitation is ten years instead of four. In both States this Statute has been held to apply to suits in equity concerning claims to real property.

Hubbel vs. Sibley, 50 N. Y., 472, 473.
Dodge vs. Clark, 17 Cal., 586.
Henderson vs. Hicks, 58 Cal., 572.
Piller vs. S. P. R. R. Co., 52 Cal., 44.

Statutes of Limitation in the State of California have the same force and effect both in actions at law and suits in equity.

Boyd vs. Blankman, 29 Cal., 44.
Lord vs. Morris, 18 Cal., 486.

It was substantially conceded by counsel for complainants in the Court below that unless the railroad company and its grantees could be permitted to avail themselves in this suit of the same immunity from the effect of the Statute of Limitations as is accorded to the United States government, the suit was bar-

red. But the Court, without the aid or suggestion of counsel, found a new and original way of avoiding the Statute, viz: that in fact the United States had a *pecuniary interest in the suit* and hence the high prerogative and privilege of the government was here available to avoid the law of the State.

This was done by first assuming that these lands were subject to the grant to the railroad company. Second. That the United States under their statutory contract were bound to give to the railroad company patents for these lands, but by the mistake of their officers the United States has put it out of its power to perform such contract and hence the United States is liable to the railroad company in damages in money to the amount of the value of the land, and hence is interested to the extent of the full value of the land in vacating the titles of defendants in order to relieve itself from such liability. We submit that this conclusion of the Court is unsound; it is based on premises non-existent in fact.

First. It is doubtful if the relation of the government to the railroad company is one of ordinary contract; the grant to the railroad company is a voluntary donation of land in aid of the building of the road. It is like the grants to the State in aid of schools and internal improvements. No one ever supposed these to be in the nature of contracts. In these matters the government has doubtless pledged its faith to have these bounties legally and fairly executed and performed, and has expressely left such performance to the executive officers of the Land Department, and in case of an occasional mistake or error of such officers whereby a piece of land is given to one donee when it should have been given to another, the government does not become liable in money damages as upon ordinary contract. But the bare statement of the entire proposition is sufficient, in our opinion to shock the moral sense of every well regulated mind, viz: that because of an honest mistake or error of the officers of the Government by which it has incurred a liability to another, the Government can equitably relieve itself of such liability by setting aside the title to land acquired by a bona fide claimant for value, against whom no wrong is imputed, and at any time the government or its officials shall please to act in the matter.

This, however, is a vice that underlies the entire case as we have sought to show.

But a complete answer to the proposition of the Court below is, that any claim of the railroad company against the Government arose not later than April, 1873, when the last of these lands were listed to the State. The wrong had then been consumated, the lands in question had then all been listed to the State, the damage had been done and the claim had matured and the cause of action had accrued. Under Section 1069, Revised Statutes of the United States, all claims against the Government are absolutely barred unless filed in the Court of Claims within six years after such claim first accrues. Such claim, if it ever existed, had been barred more than four years when this suit was brought. Hence no such *liability existed* when this suit was commenced.

We had supposed that the principles of law and rules of decision upon this point in this class of cases had become settled at least in the Federal Courts. (U. S. vs. Beebe, et al., 127 U. S., 338.) In that case a bona fide claimant had made a valid location and selection of a tract of land under a New Madrid certificate, perfected his claim under the law, and received a certificate which he had filed in the Office of the Commissioner of the General Land Office, upon which he became entitled to a United States patent for the land. The certificate was based upon a donation by Congress, viz: upon a New Madrid certificate Afterward, and while the matter was pending, Beebe and others, by some imposition or fraud practised upon the officers of the Land Department, procured a patent to be issued to them for the same land.

Suit was permitted to to be brought in the name of the United States to cancel the Beebe patent. On demurrer to the bill the defense relied upon, first, want of authority in the Attorney General to bring the suit in the name of the United States; second, that the claim was barred by the Statute of Limitation; third, that the claim was stale, and fourth, that the plaintiff had no equity to maintain the suit.

The first point was overruled on the ground, first, that the bill charged fraud and imposition by the patentees; second

that it appears by the bill that an obligation exists on the part of the United States to issue a patent to the former claimant and that it cannot perform such obligation until the fraudulent patents are annulled. As to the second and third points it is said that the United States are not barred by any Statute of Limitations or by any laches however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a public interest; but that the case stands on a different footing and presents a different question where the government, although a nominal complainant, yet has no real interest in the litigation, but has allowed its name to be used for the sole benefit of private persons.

It is further said, "An inspection of the record shows that the government, though in name the complainant, is not the real contestant party to the title or the property in the land in controversy.

It has no interest in the suit and "has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied." "The bill itself was filed in the name of the United States and signed by the Attorney General on the petition of private individuals and the right asserted is a private right which might have been asserted without the intervention of the United States at all."

And again "the mere use of its name in a suit for the benefit of a private suitor, cannot extend its immunity as a sovereign government to said private suitor whereby he can avoid and escape the scrutiny of a Court of Equity into the matters pleaded against him by the other party, nor stop the Court from examining into and deciding the case according to the principles governing Courts of Equity in like cases, between private litigants."

"These principles so far as they relate to general Statutes of Limitation, the laches of a party and the lapse of time, have been rendered familiar to the legal mind by the oft repeated enunciation and enforcement of them in the decisions of the Courts."

"According to these decisions Courts of Equity in general recognize and give effect to the Statute of Limitations as a

defense to an equitable right, when at law it would have been properly pleaded as a bar to a legal right."

The principles here announced are but the dictate of common sense and natural justice. Had this or a similar suit been brought in the names of the real parties in interest, based upon the adverse claim of the railroad company, any Court in California, State or Federal, must have held such suit barred by the Statute of Limitations of the State. There could be no escape: the Statute of the State provides, explicity, each case that is excepted from the operation of the Statute of Limitation (see Sections 328 and 352, Code of Civil Procedure) and none of these exceptions affect the case at bar.

The claims upon which this suit is based were barred by the Statute of Limitation and could not be enforced by their owners in July, 1883. By the operation of the same Statutes and the adverse possession of the defendants and their grantors, such claims had become extinguished; they were in a legal sense dead; they had thereafter no vitality or legal force and in fact no legal existence. The contention of the real claimants must be therefore that by procuring the name of the United States as complainants their claims which were dead, are now made alive.

In Arrington vs. Liscom, 34 Cal., page 385, the Supreme Court of California, by Sawyer, C. J., say: "*Under our Statute of Limitations a five years adverse possession covers all actions and as effectually bars all rights of other claimants as a sixty years adverse possession under the common law.*"

The above was a suit in equity to redeem a mortgage. In Bicknell vs Comstock, 113 U. S., 149, this Court says in reference to Statutes of Limitations, viz: "*The lapse of time limited by such Statutes not only bars the remedy, but it extinguishes the right and vests a perfect title in the adverse holder.*"

The Court below entirely ignores the principles announced in United States vs. Beebe, supra, as to the effect of the Statute of Limitations. It was conceded in that case that the United States was under an obligation to the former claimant that he had done all that the law required to entitle him to a patent and it was the clear legal duty of the United States to give

him a patent for the land. Yet it was held that the United States had no interest in the subject matter of the litigation, viz: the land or the title thereto, although Beebe had procured his patent by fraud and imposition upon the government or its officers. It was conceded upon the record that the claimant had the clear and undoubted right to the land; that Beebe had by fraud and imposition procured the patent to issue to him. It further appeared that the former claimant and those claiming under him had been prosecuting such claim in the Land Department. Yet the Court denied the relief sought, on the ground alone of laches and charged all of such laches to the real party in interest and held in plain terms that where it appeared that the suit was prosecuted in the name of the United States, but on behalf of private persons, the defendant could avail himself of the defense of the plea of the Statute of Limitations, or of laches, in the same manner and with like effect as though such suit had been brought in their own names.

A contrary doctrine will allow private persons who have the means and the control of influence in the executive departments to procure the name of the United States as complainant in which to prosecute their suits and thereby avail themselves of the immunity accorded to sovereigns and sovereign governments. What becomes of the boasted doctrine of the equality of our citizens and people under the law if this practice is to be tolerated?

The Court below concedes that the United States had no interest in the Beebe case, but finds that it has an interest in a case where these grantees of the railroad company are the claimants, the features of each case invoving the same principles with the exception that in the former case the title sought to be set aside was made solely by the fraud and imposition practiced by the defendant while in the case at bar the title was procured in good faith and upon a claim of right. The doctrine in the case of Beebe ought certainly to be respected and applied in this case.

Chancellor Kent (2 Com., 428) says: "It is settled in the law of all civilized countries that real property, as to its ten-

ure, mode of enjoyment, transfer and descent is to be regulated by the *lex loci rei sitae*." This is still settled law.

Hence the Statutes of Limitation of actions of the States of our Union concerning real property, form part of the tenure by which such property is held, and furnish the means by which the title is protected. These Statutes are not to be ignored or evaded by the Courts, but enforced as a matter of right for the purpose of settling and protecting titles fairly and honestly acquired.

This practice of the Attorney General in permitting private parties to use the name of the United States in which to litigate their private claims and to give a bond to exonerate and save harmless the United States against cost or expense and the strained holding of the Court to the effect that such private parties in such suit may be deemed to have the benefit of the high prerogative of the government in evading the Statutes of Limitation would seem to be nothing less than a perversion of law and common justice.

It may be for this reason that Congress by an act entitled "An act to repeal Timber Culture Laws, and for other purposes." Approved March 3d, 1891, by Section 8, have enacted as follows. Section 8. "That suits by the United States to vacate and annul any patent heretofore issued, shall only be brought, within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued, shall only be brought within six years after the date of the issuance of such patent."

Again the Court below says there has been no laches on the part of the railroad company because it has been pressing its claims earnestly before the Land Department from the first.

We have before commented upon the utter futility of such proceedings taken after all the land has been listed to the State of California upon the claim of the State, and before a tribunal without jurisdiction. But how does it appear that the railroad company were so earnestly pressing its claims from the first?

The bill shows that on the 1st day of February, 1870, the entire line of road had been completed and accepted by the proper

officers, the line definitely fixed and the map thereof placed on file in the General Land Office.

Nothing since said last named date has been done or has been or was required to be done by the railroad company to perfect its claim to such lands as passed under its grant.

At that date the defendants or their grantors were in possession of the lands in question in this suit, holding them under certificates of sale from the State based upon selections by the State of record in the land office of the State and also of record in the local and General Land Offices of the United States.

These claims were then at least a cloud upon the right or title of the railroad company of which they were bound to take notice. The Courts of the State were then as now open *to* them and on and after February 1st, 1870, and for four years thereafter they could have had their action in their own name for the determination of the validity of such claims and if found invalid had them removed and canceled as a cloud upon their superior and better right if so found.

The railroad company did nothing, and by their inaction and silence acquiesced in this state of affairs for four years, three months and eleven days, until such action had become barred by Section 343, Code of Civil Procedure, a Statute of Limitation of such actions under the laws of California, and then on the 12th day of May, 1874, finding no other course open to them, commenced this ex parte proceeding in the land office, which as the bill shows, was pending up to October 18th, 1882, a period of eight years, five months and six days, all of which time was required to demonstrate the simple proposition that the officers of the Land Department could pass the title to the same piece of land but once and thereafter as to such lands they became *functus officio*. Finding no other course, they then sought after and found a compliant Attorney General in the person of Mr. Brewster, who while confessing that he could form no opinion as to the rights of the parties to the land on the 20th day of February, 1883, gave them leave to use the name of the United States as complainant in their suit against these defendants.

The above are the facts and all the facts upon which the Court below finds that the railroad company "has been pressing its claim earnestly before the Department from the first."

We submit that the railroad company and those claiming under it had by their own laches permitted these claims to become barred by the Statutes of Limitation of the State of California before they set up any claim in the United States Land Office in May, 1874. That in July, 1883, any claim which the railroad company may have had in 1870 or in 1873 had become barred from enforcement and legally extinguished by the operation, force and effect of the Statutes of Limitation of the State of California and that all this appears upon the face of the Amended Bill.

As to the doctrine of this Court where private rights alone are involved upon the effect of the Statute of Limitation and laches, see

Godden vs. Kimball, 99 U. S., 201 and 210.
Brown vs. Co. Buena Vista, 95 U. S., 160.
Wagner vs. Baird, 7 How., 258.
Piatt vs. Nattier, 9 Peters, 415.

As to the construction of Section 343, of the California Code of procedure, see

Piller vs. Southern Pacific R. R. Co., 53 Cal., 42.

The Case as it Appears from the Whole Record.

The record discloses the fact that as early as 1862, 1863, 1864 and 1865 the lands in controversy were selected by the proper officers of the State, viz: the "State Locating Agent," as indemnity for 16th and 36th Sections not in place under and by virtue of the 6th and 7th Sections of the Act of Congress of March 3rd, 1853, (10 U. S. Statutes 244) granting certain lands to the State for the purpose of public schools in each township; and the laws of the State relative to the selection

and sale of the same see Statutes California, 1858, page 127-248, Statutes 1861, page 218, Statutes 1863, page 591.

The office of Locating Agent was created by Statute in this State (Statutes California, 1858, page 248.) One such person was commissioned by the Governor for each United States Land District to select and locate public land under Congressional Grants to the State.

The lands in question are situate in two separate townships, viz: in township 3 S. R. 3 E. and in township 2 S. R. 1 E., Mt. Diablo Meridian. It will be found convenient to consider them separately.

At page 245 of the record will be found an agreed statement as to the selections in Tp. 3 S. R. 3 E. from which it appears that the State Locating Agent made four selections in this township, viz: two May 22d, 1863, one June 25th, 1863, and one May 16th, 1864.

That upon application by the Locating Agent each of these selections were, by the Register of the United States Land Office in San Francisco, entered upon the tract book of said office on each of the above named dates respectively. That such selections were approved by the proper officer of the State and Certificates of Purchase were issued to M. D. Townsend, A. B. Winegar, Geo. W. Dam and M. B. French respectively. (See Exhibits 3, 4, 5 and 6, pages 247 to 255 Record.)

At pages 256 and 257 will be found Exhibits 7 and 8; the first is a certified copy of that part of the record required by the State Statute to be kept by the State officer of said selections, and the second is a certified copy of the double page of Tract Book No. 10, from the United States Land Office showing the entries of said selections therein by the Register and the date of said entries. An inspection of the Certificates of Purchase (Exhibits 3, 4, 5 and 6, page 247 to 255) will show the terms of sale by the State, viz: 20 per cent. on the purchase price and interest in advance on the balance for one year and thereafter 10 per cent or the deferred purchase price. The endorsements on the back are official receipts of the annual interest on said balance of deferred purchase money until

November, 1871, when the balance is paid as shown by last official receipt, at which time patent is issued and certificate surrendered and cancelled.

The same or similar receipts will be found on each of said certificates.

As early as April 13th, 1859, it was provided by Statute as follows: "The Certificate of Purchase, or of location of any lands in this State issued or made in pursuance of the laws of the United States, or of this State, shall be deemed prima facie evidence of legal title in the holder of said Certificate of Purchase, or location or his assignees." Statutes California 1859, page 227, see also Statutes California 1863, page 597, Section 17.

The above selections in Township 3 S. R. 3 E. were approved by the Secretary of the Interior, November 15th, 1871, and the land listed to the State on the same date (see approved and certified list, pages 173 and 174) with the exception of the land sold to Geo. W. Dam. This selection was approved March 24th, 1873 and thereupon the land embraced therein was listed to the State and this is a part of the listing complained of in the bill.

It will be seen that these four certificates of purchase embrace a sale of 1249 $\frac{19}{100}$ acres of land; as a matter of fact complainant asks to have title extinguished to only 649 $\frac{19}{100}$ acres of the above land. The secret of this lies in the fact that the 600 acres excluded embraces only even numbered sections in which the railroad people have no interest.

Township 3 S. R. 3 E. was surveyed, sectionized and the survey in the field completed August 27th, 1862. Such survey was constructed into and upon a township plat, and on the 24th day of December, 1862, such survey and plat was approved by E. H. Beale, Surveyor General of the United States for California which plat has since and now remains a record in his office. (See Resp. Exhibit 1, 9th Ex. in Book of Maps.)

We here call attention to the fact that this record shows that each of the selections in this township had been made and

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We here call attention to the fact that this record shows that each of the selections in this township had been made and

completed by the State and had become matter of record both in the State and United States Land offices before any sign of a railroad either on the ground or on paper had been made.

The State sold to Townsend, January 25th, 1864; to Winegar April 16th, 1864; to Dam, January 26th, 1864; to French, August 12th, 1865. We date the sales at the time of first payment as shown by County Treasurer's certificate recited in each Certificate of Purchase. The first sign of railroad was the filing of map of general route, December 8th, 1864, in the General Land office at Washington, D. C.

The line of this railroad from Vallejos Mill or point marked Flag Staff 1, to point marked Flag Staff 11, at or near the City of Sacramento, was not surveyed or marked on the ground until the year 1868. (See Respondents Exhibit 56 and certificates of Railroad officials thereon. Being 15th Exhibit in Book of Maps,)

The defendants herein, to whom the above titles have come by mesne conveyances from said original purchasers, are as follows, viz: Henry F. Crane, Thomas Newell, Le Grand Morehouse, Andrew S. Barron, The Bank of California, Franz Leberer, Patrick and Margaret Armstrong, Garrison Gerst, Charles G. Johnston, Sr., and Thomas W. Moore.

All the other defendants are interested alone in lands in Township 2 S. R. 1 East.

On behalf of said first named defendants we submit that the record shows a clear title in law and equity, a title that had its origin and inception more than five years before the railroad company had given any definite intention of building this line of road.

The township was surveyed in the field and such survey completed August 27th, 1862. The township plat was made and the survey and plat approved by the Surveyor General on the 24th day of December, 1862.

Recapitulation.

The selections were made May 22nd, June 25th, 1863, and

May 16th, 1864, and entered at the United States Land Office on the same dates.

The northwest quarter of Section 21 and northeast quarter of Section 20 was sold to M. D. Townsend, January 25th, 1864.

The southwest quarter of Section 21 and the southeast quarter of Section 20 was sold to A. B. Winegar, April 16th, 1864.

The northwest quarter, the west half of the northeast quarter and the northeast quarter of the northeast quarter of Section 19 was sold to George W. Dam on the 26th day of January,1864.

The south half of southwest quarter and southwest quarter of southeast quarter of Section 17; the northwest quarter of Section 20 and southeast quarter of northeast quarter of Section 19 was sold to M. B. French, August 12th, 1865.

Three of said selections were approved by the Secretary of the Interior, November 15th, 1871, and on the same date the land embraced therein was certified over to the State and patented to the purchasers.

The other selection was approved March 24th, 1873, the land certified to the State on the same date, and patented to the purchaser or his assignee.

That since the issuance of said patents and prior to the commencement of this suit said patentees "did, by valid mesne conveyances duly executed and acknowledged, convey all their right, title and interest in and to said land to the defendants herein." Record, pages 15 and 16, Sub. 26 of Bill.

Such is the record of title to the land in controversy, situate in Township 3 S. R. 3 E., Mount Diablo meridian, which the United States, as complainant, is seeking, as to the odd num-

bered sections and portions thereof therein contained, to have set aside, vacated and extinguished, in order that it may be patented to the railroad company or its grantees.

It will be remembered that each of these selections was made about a year before any map was on file designating the general or any route of said road.

The State sold, and the above named persons became the purchasers of these lands and were in possession by Certificates of Purchase from four to five years before any line of said road was surveyed on the ground.

At the date of the completion of the railroad, December 29th, 1869, and at the time of the filing of map of definite location and completion, February 1st, 1870, the claims of the defendants or their grantors were of record in the United States Land Office and in the State Land Office, and all the facts relative to the origin and nature of such claims have since remained matter of public record.

Upon the trial of the case it first became manifest that counsel for complainant relied solely upon the pretext that this township had not been surveyed at the time the selections were made and hence such *selections* were irregular and void.

The Court further assumes in aid of its opinion and the pretentions of the complainant that these lands at the date of selection were claimed under a foreign grant or title and therefore that such *selections* were void.

Upon each of these pretensions the Court held that the claim of the State was vitiated in its inception and for that reason must be set aside.

We submit again and reiterate the proposition that each of these are matters upon which no charge is made in the bill; that no issue upon the validity of said *selections* is tendered by the bill.

Second. That the United States, as complainant, cannot, on its own behalf complain of any irregularity, defect or invalidity in any of *these selections*, and hence has no shadow

of interest in any litigation or claim of third parties relating thereto.

See act of Congress, approved March 1st, 1877, entitled, "An act relating to indemnity school selections in the State of California." (19 Statute, page 267, Ch. 81.)

The second Section contains the following language, viz: "That where indemnity school selections have been made and certified to the State, and said *selections* shall fail by reason of the land in lieu of which they were taken not being within such final survey of a Mexican grant, *or are otherwise defective or invalid the same are hereby confirmed.* * * *

In *Durand vs. Martin, 120 United States, 371*, this Court says, "This Statute was, in our opinion, a full and complete ratification by Congress, according to its terms of the lists of indemnity school selections which had been before that time certified to the State of California * * * no matter how defective such selections might have been."

It must be conceded that this ratification by Congress operates as a complete bar against the United States maintaining a suit to set aside these listings on the ground of any defect or invalidity in the selections. As to these selections such defects, if they ever existed, are waived and the selections confirmed. If the Railroad company had acquired such a status as to this land in February, 1870, as the Court claims, or had acquired a vested interest or right, it might not be affected by such ratification; but not having asserted such right in any proper Court against those in possession under the State title, such right became extinguished by lapse of time and adverse possession, and such suit by them or on their behalf alone, is barred by the Statute of Limitation of California. If the United States can maintain an action on behalf of the railroad company on account of some assumed obligation, such suit must stand or fall upon the strict rights of the private parties so represented. No prerogative of the government can be called to its aid because all rights of the government are barred by such ratification.

The defendants plead the want of interest in the United

States as complainant, the staleness of the claim and the Statute of Limitations.

See Record page 33, sub. 4, part of folio 62 and folio 63.

We have shown who the real parties in interest are; that they prodcured from the Attorney General leave to use the name of the United States as complainant; that they have employed and paid their own attorneys to commence the suit and prosecute the same, and have given to the United States a bond to protect it against costs. The record from first to last shows that none but these persons have any shadow of interest in the result of this suit, and fails to show any obligation or interest on the part of the United States to prosecute this suit for their use and benefit. The Record shows that they are seeking to prosecute the suit for their sole benefit. See Record, sub. 4, folio 63, page 33 also deposition of S. G. Hilborn and F. H. Waterman, pages 143 to 147.

Hence we repeat that the decree of the lower Court should be reversed, first, because the United States has no interest to maintain the suit on behalf of the government and is not shown to be under any obligation to the real parties in interest to maintain this suit in their behalf.

Second. Because on the 23rd day of July, 1883; all rights of the railroad company and its grantees to the land in controversy and all suits by them or on their behalf against the grantees of the State of California had become barred by the Statute of Limitation of the State of California, where said land is situate.

Third. Because the defendants in this suit appear to be purchasers in good faith and for value from the original grantees of the State of California who paid the full purchase price for said lands to the State of California without notice of any claim of the railroad company to said land or any part thereof.

The Case on its Merits.

We now propose to show more specifically that no cause is shown, either at law or in equity to justify the Court below in setting aside the titles to the land in question situate in Township 3 S. R. 3 E., Mount Diablo meridian.

The Court below held that these selections were made in May and June, 1863, and May, 1864 *from land that had not been surveyed by the United States* and were therefore void in their inception. It is conceded and the record shows that this township was caused to be surveyed in the field and such survey was completed August 27th, 1862. The survey was returned to the office and platted and the survey and plat was approved by the Surveyor General of the United States for California, December 24th, 1862.

See Ex. 1, ninth exhibit in book of maps. (Note. The quarter section lines are scarcely discernible on this copy.) This plat seems to have been amended in 1871, by Surveyor General Hardenbergh by tracing on the original plat, Lot No. 37 being 417 $\frac{46}{100}$ acres which the Mexican grant, Los Positos, by the final survey and patent, took from this township.

Respondents exhibit No. 25, 11th Ex., Book of Maps, is a certified copy of the same plat from the records of the General Land Office in Washington without alteration or amendment. A memoranda on the upper right hand corner of the plat as follows, viz: "Received with Surveyor General's letter of December 29, 1862," tends to show that it must have been received at that office in the early part of 1863, sometime in January.

The Record further shows (page 256) that the account of the State Locating Agent calls for locations on surveyed lands. The Tract Books of the Local Land Office, which are the per-

manent records of that office, show that on the same dates respectively that the State officer certifies that he made these selections, the Register of the United States Land Office made his entry thereof in the Tract Book No. 10 of that office, viz: two on May 22d, 1863, one on June 25th, 1863, and one on May 16th, 1864, the latter embracing two entries for one selection, being lands in different sections (page 457). If Mr. Swift is correct in his testimony (Record page 136) it tends to show that these entries were allowed at the Local Land Office on the respective dates certified to by the State Locating Agent and in due course reported to the General Land Office and entered in the Tract Books of that office and afterward transferred into the Tract Books made for the local office. This is equivalent to the agreed statement of facts (Record, page 245.) This copy from the Tract Book embraces only the *odd* numbered sections involved in this township.

Each of the Certificates of Purchase call for *surveyed* land. Where selections were made, as in Township 2 S. R. 1 E., from lands unsurveyed by the United States the Certificates of Purchase call for *unsurveyed* land. See first six certificates pages 265 to 273.

But the Court held and decided that because it was not made to appear that a duplicate copy of this township plat was on file in the Local Land Office in San Francisco when the selections in this township were made the titles of the defendants to said lands must be set aside. We submit that upon this record there is no legal evidence that this township plat, or a duplicate copy thereof, was not sent to and properly lodged in the local Land Office in San Francisco, and was there in use by the Register when these selections were made.

The Statutes of the United States in 1862 provided the same as now, viz: that the Surveyor General "*shall transmit to the Register of the respective land offices within his district, general and particular plats of all lands surveyed by him for each land district, and he shall forward copies of such plats to the Commissioner of the General Land Office.*"

Under the law it became the duty of this official, within a

reasonable time after his approval of this plat, to transmit a duplicate thereof to the Register of the Land Office in San Francisco, and to forward a copy of the same to the Commissioner of the General Land Office at Washington. Revised Statutes United States page 392, sub. 4, Section 2223.

The Record shows that he did transmit such copy to the General Land Office with his letter dated December 29th, 1862.

There is nothing in this record to show that he failed to perform his duty in transmitting a copy to the local Land office of the district in which the land was situate. If this be so, the presumption of law is that he performed his duty in that behalf and such presumption will stand until the contrary is made to appear.

Again, how will we explain the acts of the Register of the local Land Office in acting officially upon these applications on each of the respective dates? A very little reflection will show that the Register cannot legally act upon any legal subdivision of public land unless the plat of the official survey is in his office. Either the plat was there as an official record or the Court is compelled to presume that the Register was guilty of a fraud in entering State selections of the public lands on the Tract Books of the office or permitting such selections to be made when he had no official knowledge of the existence of any such township or subdivision thereof.

The Court below erred on this behalf in following the facts and the law as set forth in the opinion of certain Department officials made January 15th, 1878, March 9th, 1878 and June 26th 1879. These opinions, we submit, cannot be evidence, they were given in ex-parte proceedings on the part of the railroad company long after these selections had been approved and the land certified over to the State and patented to its purchasers; these officers had no jurisdiction to hear, try or determine the validity of these titles. All questions had become purely judicial and the railroad company could not, by such ex-parte proceedings, in which the defendants were not parties and had no notice, manufacture testimony for this suit.

The first of these opinions as shown by the record, page 192, would seem to have been entitled "*The State of California* vs. *M. D. Townsend, et al.*" It will be seen by inspection that it had relation to lands alone in Township 3 S. R. 3 E. Why the State of California should have been litigating with M. D. Townsend, its purchaser or any one, five years after it had patented the land, does not appear.

The fact is that this proceeding, like most of the proceedings on behalf of the railroad company, before the Land Department, was an attempted fraud gotten up by them without notice to the real parties in interest, and prosecuted ex-parte under some assumed name, with the intent and purpose of procuring United States patents for the land from these Department Officers as we have before shown. The other opinions cited are based upon the the Townsend case.

The vice of these opinions as well as that of the Court lies in the assumption by them, that unless a plat can be produced bearing upon it in writing the date of its receipt at the office, authenticated by the signature of the Register, it necessarily follows that no such plat was there at that time.

We have searched in vain to find any law or rule of the Department requiring any such endorsement and we know in some cases it has not been made. No other record is required to be kept on that subject. The only legal evidence given by complainant on this subject is its exhibit "W" being one of the many copies of this plat now in the Land Office. (Fourth Exhibit, second Volume Records.

This proves that on the 4th day of June, 1869, Mr. Sherman Day, then Surveyor General, made and certified this as a copy of the original plat approved by E. F. Beale, December 24th, 1862, and that such copy was marked filed in the United States Land Office on the same date by Mr. H. G. Rollins, then Register—nothing more.

We submit this does not tend to prove that the *Duplicate original* was not in the office in 1863-64.

The defendants put in evidence (Exhibit 26 Volume 2 Record 12th Exhibit) plat of same township surveyed in

1862, amended by placing thereon Lot 37, portion of Los Pocitas, marked filed in United States Land Office, July 1st, 1871. Also another plat of same township (Exhibit 9, Volume 2 Record, 10th Exhibit) as amended by placing thereon portion of the Dyer survey of Los Pocitas grant.

It will be seen by the tabulated memoranda on each plat, that the survey of 1862 is the basis of all the subsequent plats of this township.

If there were no presumptions in favor of the regularity of the official acts and proceedings of the Surveyor General and Register, we submit the proofs are insufficient to justify the decision of the Court on this point.

Assuming that the Surveyor General performed his duty under the law; twenty years or more elapsed prior to the commencement of this suit, and there are many ways in which this plat may have become lost or have ceased to be a record of the local office.

These township plats in the Local Land Offices are at all times subject to the inspection of the public, all sorts of people have free access to them and hence in a few years they become soiled, and the lines, words and figures thereon are obliterated, the map worn out and rendered unfit for use, and therefore cast aside. New copies are procured from the office of the Surveyor General. All data having become obliterated by filing marks on the worn out map, the new copies are marked filed as of the date when received.

As a matter of fact no permanent record is by law required to be kept or is kept in the Local Land Office of the time when the township maps are received therein.

If they are to be regarded as a necessary muniment of title a better record should be kept of them.

But the burden of proof was upon the complainant on this issue. No proof was given by it, *non constat* the plat was at all times and is now in the office, the defendants proof raises the presumption that the plat was on file in the office when the selections were made and the Court below should have so held upon this record.

Colorado Coal Co. vs. United States, 123 U. S. pages 316 to 319.

The Court says (Record page 57, folio 110): "A plat approved by the Surveyor General December 18th, 1865, however, was filed in the District Land Office on December 28th, 1865. This plat will be found in Volume 2 of Maps, 10th Exhibit. It will be seen that it is approved as an *amended map* of Township No. 3 S. R. 3 E.

It has delineated thereon Lot No. 37, containing 7,770 $\frac{58}{100}$ acres of land of a fradulent survey of the Mexican grant Los Pocitas, which survey was in 1867, as we will presently show, made and approved by this same Surveyor General L. Upson.

Doubtless the original plat was withdrawn from the Land Office at that time in order to make clear sailing for this big steal.

Hence we submit that the Court erred in finding that the selections made in this township were at the dates thereof made from unsurveyed land.

That from this record it is made to appear that the survey of this township was completed when on the 24th day of December, 1862, the United States Surveyor General approved the survey and plat of said township. See

Oakley vs. Stuart, 52 Cal., 521.
Medley vs. Robinson, 55 Cal., 396.

That he forwarded a copy of said plat to the General Land Office on or about December 29th, 1862, and about the same date transmitted a duplicate of said plat to the District Land Office, and that such plat was a record in said office when the State Locating Agent made said selections in May and June 1863, and May, 1864.

Los Pocitas.

Upon another issue not made by the bill, the Court held in

affect that on the 22nd of May and 25th of June, 1863, and the 16th of May, 1864, the date of the selections, the lands so selected were then claimed under a foreign grant or title and hence not subject to selection by the State. The act of March 3rd, 1853, (10 Statutes 244) Section 6 referred to by the Court is in terms but a limitation upon the right of pre-emption, but we deny the assumption by the Court that these lands at the time of selection, or at any time, were claimed under any foreign grant or title. The grant referred to is known as the Mexican Grant Los Pocitas.

The record shows, and it will be conceded, that this was a grant of two square leagues of land to be located within certain exterior boundaries.

It was confirmed by the Board of Land Commissioners February 14th, 1854, for two square leagues, a little more or less. Record, page 283.

Robert Livermore, then the sole owner of the grant, (Record Volumn 1, page 121, folio 224) procured the Surveyor General to make a survey of the land claimed by him. (Record pages 200 to 211.

This survey was made in May, 1854, by Deputy Surveyor, William J. Lewis, and has since been known as the "Lewis Survey," it was returned platted, approved and placed on file in the Surveyor General's office, June 19th, 1854, Record, page 215, 2nd Volume, Exhibit D. D., 5th Map; also Exhibit F. F., 2nd Volume, 7th Exhibit.

The Surveyor General certifies that the survey is made in conformity with the description of the land contained in the decree of the United States Board of Land Commissioners. See Exhibit "E. E." and "F. F.," Volume 2nd, 6th and 7th Exhibits; also "Exhibit Hopkins," 17th Exhibit, Volume 2.

Especial attention is called to Exhibit "F. F." and Exhibit "Hopkins," each shows the three surveys of the grant and all the land in controversy and Exhibit "E. E." shows the topography. The land in controversy in both townships is situate, as will be seen, entirely outside the lines of this survey, one viz: township 3 S. R., 3 E. is at the extreme southeast

end of the valley township, 2 S. R., 1 E. at the extreme northwest end of the valley known as "Livermore Valley."

This "Lewis Survey" contained 20,846 acres of land, nearly five square leagues of land.

See Surveyor General's estimate, Exhibit D. D., 5th Map, Volume 2. This survey was doubtless procured to be made by Livermore, upon his assumption that the confirmation of the Board of Commissioners was final. He and neighboring ranch-claimants were present and pointed out their adjacent lines, and Livermore expressed himself entirely satisfied with the lines ran by the surveyor.

See official notes, Volume 1, page 210, folio 379.

The Record, Volume 1, page 284, shows that an appeal was taken and an application for a review and reversal of the decree of the Board was filed in the United States District Court, July 14th, 1857.

Livermore became sole owner March 7th, 1853, and remained sole owner until the time of his death in 1858, (Volume 1, Record, page 121) after his death, proceedings were continued in the name of his widow and son, viz: after February 3, 1859, (Record, page 285.)

February 18th, 1859, the United States District Court confirmed the grant *as containing in all two square leagues of land*, Volume 1, Record, page 286.

This decree of the District Court was affirmed by the Supreme Court at December term, 1860. Mandate filed in United States District Court February 24th, 1865, Volume 1, Record, page 287, folio 508.

This Lewis Survey was treated by Livermore during his lifetime and by adjacent claimants and the public as embracing all the land claimed by him under this grant—more than double the amount called for by the grant and final decree of confirmation and none of his heirs or executors claimed more.

There would never have been any pretext for holding or pretending that any of the land in controversy was ever

claimed under this grant had it not been for a survey made and approved by Surveyor General L. Upson, February 8th, 1867, embracing 43,011$\frac{31}{100}$ acres of land, nearly ten square leagues of land—known as the "Dyer Survey." See Exhibit 29, Volume 2 of Maps, 13th Map—Volume 1, Record, pages 291 to 295. This was an attempt to expand a grant limited on its face to two square leagues to about five times that quantity, and that in despite of the decrees of the Courts. It was *prima facie* an attempted fraud, an attempt by corrupt practices, under the forms of law to rob the government, the honest settlers and *bona fide* purchasers of about seven square leagues of the public lands. It had the color of official life from February 8th, 1867 to July 30th, 1868, when it received its quietus by the curt order of the Secretary of the Interior, as follows: *the survey is clearly wrong and it will be returned to the Surveyor General, with instructions to reduce the quantity of land to two square leagues*, Volume 1, Record, page 297.

Under this order a new survey was made of land wholly within the lines of the "Lewis Survey;" it contained two square leagues or 8880 acres of land. It was approved by the Surveyor General, May 11th, 1870, (Volume 1, Exhibit 40, page 303) by Commissioner of the General Land Office, March 1st, 1871, and final approval by the Secretary, June 6th, 1871, (Exhibit 42, page 305). The patent based on this survey issued sometime prior to May 27th, 1872. Exhibit 43, Volume 1, page 305.

The above is a brief outline of the facts relating to the Mexican grant Los Pocitas, as shown by this record and we submit that upon the facts stated that neither at law or in equity can it be said that any of the land in controversy was at the date of said selections or at any time claimed under any foreign grant or title.

It shows that from 1854 to 1867, a period of thirteen years, the owner of the grant and his legal representatives had caused the lines of his claim, under this grant, to be marked out by an actual and completed survey on the ground, fixed the lines and landmarks of his claim and advertised to the world, for

thirteen years, that as to all lands outside these lines and landmarks no claim was made under this grant, and that such lands might be treated as public lands.

Again the complainant and the railroad company and its grantees ought not to be permitted to assert that these lands were ever claimed under any foreign grant or title.

Township 3 S., R. 3 E., was surveyed by the government officer as public lands, in 1862, and Township 2 S., R. 1 E. was so surveyed, as we will show, in 1865, and upon such surveys the land has been disposed of as public lands.

The bill expressly charges that from 1862 to 1869 these lands were public lands of the United States (Volume 1, page 16, subdivision 27).

Arthur St. Clair Case.

Sometime about 1872 a contention was had in the land departments between the railroad company and several hundred claimants of odd numbered sections, involving lands in these and other townships, viz: from 15,000 to 20,000 acres of land.

See Registers Opinion, Vol. 1, p. 216, fol. 386.
Commissoners Decision, pp. 224 to 231.
Decision of Secretary of Interior, p. 244.

It was supposed at that time, and until quite recently, that the railroad company took no land embraced by the exterior boundaries of a Mexican grant, which was *sub judice* at the time of filing the map of definite location of the line of the road. See

Newhall vs. Sanger, 92 U. S., 761.

Hence it became a matter of public interest among the settlers and vital interest to the railroad company to have the exterior boundaries of this grant ascertained and definitely settled and

fixed. A large amount of testimony was taken and submitted on the part of the railroad company and the settlers, and full and exhaustive arguments had. The Register decided the matter November 11th, 1872, The Commissioners decided the case May 3d, 1873, and Secretary, November 25th, 1873.

See *Compt. Exhibits "G. G.," "H. H." and "J. J.,"* before cited.

Each decided that no land was claimed under the Los Pocitas grant, in a legal sense, beyond the lines of the Lewis survey made in 1854 and that *such lines marked and indicated the exterior boundaries of the land described in that grant.*

This decision and settlement of that question has never been changed. It has become the law of the Department in the disposal of these lands.

The old "Lewis survey" has been caused to be retraced on the ground and the plats of the townships through which its lines run have been amended so as to show each line on the plats.

See opinion of Hon. C. Schurz, Vol. 1, p. 190, fol. 343.

No plea or argument by counsel for complainant upon this ground was made in the Court below, and we never, until now, had an opportunity to refute the views of the Court on this point.

We here point out some palpable mistakes of fact contained in the opinion of the Court below. The Court says (Volume 1, page 53): "*Some of the lands in controversy are within the two square leagues or even within the boundaries of the Lewis survey.*"

Again the Court below says, on the same page, viz: "Between May 15th, 1863, and May 16th, 1864, after actual survey in the field, but *before the survey had been officially adopted or recognized by the Secretary of the Interior, and before it had been approved by the Surveyor General,* and filed

in the District Land Office, the State of California by its locating agent made selections," etc.

The former clause in italics is simply untrue as we have shown by Complainant's Exhibit "F. F.," entitled "Compiled Map," seventh Map in Volume 2. Also see "Exhibit Hopkins," 17th Exhibit, Volume 2.

The adoption or recognition of a township survey by the Secretary of the Interior is not necessary to its validity. The Secretary of the Interior may order a survey amended or corrected, but his approval is never required to a township surveys or plats. The Surveyor General alone approves township surveys and plats. The declaration by the Court that these selections were made before the survey and plat of this township had been approved by the Surveyor General is also untrue. (See Respondents Exhibit 1; 9th Exhibit; also Exhibit 25; 11th Exhibit, 2 Volume of Record.

On page 54, 1 Volume Record, the Court in speaking of the St. Clair case says "*it was decided in favor of the railroad company.*" We have shown by this record *what the issue was* and that the only thing decided was the establishment of the out boundaries of the Mexican grant Los Pocitas.

And yet the Court below says: "The exterior boundaries contained from ten to twelve leagues." (Record, page 51, at bottom.) And, again, at page 55, Folio 105, the Court again says: "The Mexican grant called Los Pocitas was a float, a grant of two leagues within exterior boundaries embracing ten or more leagues."

We have called the attention of the court first to facts tending to show what the owner, Robert Lidermon, claimed as the boundaries of this grant in 1854, and thence during his lifetime. There can be no doubt that Mr. Lewis made his survey upon the basis of the exterior boundaries, viz: the calls of the grant (see pages 202, 210 and 211, Record); and since, as we have shown, in 1873, such boundaries were officially re-established, settled and fixed by competent authority, that question should be deemed settled. That decision should certainly not be disturbed for purposes of injustice and wrong.

The railroad company, in 1873, by their efforts, succeeded in procuring the Land Department of the United States to settle the matter. The settlement was then in favor of their contention; it was just and reasonable, and has since been accepted and for nearly twenty years acquiesced in by all persons, and it has never been disturbed until now and in this suit by the Court below nearly twenty years since all questions concerning the Los Pocitas have been supposed to be definitely and forever settled.

We, therefore, submit that so far as the decree of the Court below purports to denounce the title of the defendants to the lands in this township as invalid and to set them aside, such decree is unjust, inequitable and wrong, and ought to be reversed.

The Case on the Merits Relating to the Lands Lying in Township 2 S., R. 1 E.

We now come to a consideration of the case, so far as the same relates to the lands lying in the above township. The same can be said in reference to the lands in this township, as before remarked, that no charge or averment of the bill gives the defendants any shadow of information as to the point of attack upon any of the matter to be litigated in reference to these titles.

It remained to be, and was developed on the trial and contended by the complainant, viz: That these selections had their *inception and origin* from lands that at the time had not been surveyed by the authority of the United States, and such selections, for that reason, were void, and that such irregularity was not in any manner remedied or cured by any subsequent proceeding. As late as 1863 (Statutes of California, 1863, page 591), the Legislature of California had, by Statute, expressly authorized the selection of land in California in satisfaction of Congressional grants from lands which had not been surveyed by the United States Surveyor General, but provided

for the extending of the lines of survey by county surveyors; and until the January term, 1863, the Supreme Court of the State had held such selections valid.

Doll vs Meador, 16 Cal., 295.
Van Valkenburg vs. McCloud, 21 Cal., 330.

Some time in 1864 the same Court held them invalid, for the reason that there could be no *legal subdivisions* to select from until the land had been surveyed under the United States laws.

Terry vs. Megerle, 24 Cal., 623.
Grogan vs. Knight, 27 Cal., 515.

For a complete history of these matters, see

Toland vs. Mandel, 38 Cal., 30.

From an agreed statement of facts (Exhibit 12) found on pages 260 to 264 of the Record, it will appear that from July 25th, 1862, to March 12th, 1863, six selections had been attempted to be made by the State Locating Agent; and on the 22d of September, 1865, two additional selections were made, making eight selections in this township containing in all $2399\frac{58}{100}$ acres of land; upon surveys made by the county surveyor in accordance with the State Statute (Statutes of California, 1861, page 219, Section 5), except the two selections made in 1865, were made after the United States survey.

It further appears from the statement (page 260) that this township was not surveyed by the United States Surveyor General until March, 1865. It was about that date sectionized, subdivided and platted, and on the 6th day of April, 1865, such survey and plat was by the Surveyor General approved, and on the 10th day of June, 1865, a duplicate of said plat was filed in the Land Office of the United States at San Francisco (Comp. Exhibit 5, Second Volume, Third Exhibit).

It will thus be seen that six of said selections were attempted

to be made before the land had been surveyed by the United States Surveyor General, and two were made after the survey. We shall first consider the status of these six selections.

It will be seen by Exhibit 12, page 260, that in making these selections the State officer sought to have them and each of them entered at the United States Land Office, but the Register refused to allow such entries because no plat of the survey of that township had been deposited therein by the Surveyor General.

From Exhibits 13, 14, 15, 16, 17 and 18, pages 265 to 273, it will be seen that the State proceeded to sell the land to its purchasers, viz: 320 acres to Thomas Murphy, June 27th, 1863; 320 acres to Samuel B. Martin, February 11th, 1863; 320 acres to J. B. Purdy, December 28th, 1863; $319\frac{58}{100}$ acres to Marshall M. English, December 28th, 1863; 160 acres to A. J. Shrader, March 14th, 1865; and 320 acres to Samuel Davis, February 20th, 1865. We date the sales *from the dates of first payment to the State* shown in these exhibits, viz: The Certificates of purchase; because, under the laws of the State, the sale is deemed made and the Certificate of Purchase is due and should issue to the purchaser upon the payment of the twenty per cent of the purchase money and interest in advance for one year. These selections were made at a time when they were *sanctioned by the Statutes of the State and pronounced valid by the highest Court of the State, and the Certificates of Purchase described the land as unsurveyed.* As we have seen, this township was surveyed in March, 1865, and the plat of survey was filed in the United States Land Office on June 10th, 1865. On the 12th day of June, 1865, upon application of the State Locating Agent, each of these selections were by the Register of the United States Land Office entered in Tract Book No. 11 of the Records of his office (see agreed statement, pages 260 to 263; see also Exhibit 22, between pages 276 and 277; see also page 277, a portion of Record of State Locating Agent, entitled, "Account of State Locating Agent, School Land Locations on Surveyed Land," showing that the State officer deemed these selections complete on the date of entry in the United States Land Office.) We submit

that, as between the United States and the State of California, these selections may be deemed to have been reselected in June, 1865, and would be valid unless some claim had intervened and become attached to the land before such reselection. We shall, further on, seek to show that no such claim had attached in June, 1865.

The same Record shows the State Locating Agent selected the lands in Section 35, T. 2 S., R. 1 E., June 13th, 1865, after the survey of the township and the filing of the plat in the United States Land Office, and on the same day the Register of the United States Land Office, at the request of the State officer, entered these selections in Tract Book No. 11 in the United States Land Office (Exhibit 22, *supra*). Here, then, the record of selection became complete and harmonious as between the State and United States Land Departments, viz: They had become entries of record in both the United States Land Office and the Land Office of the State.

Nothing now remained to be done but the approval of the selections by the Secretary of the Interior and the listing of the land to the State. Six of these selections were approved by the Secretary of the Interior, September 8th, 1870, and on the same date the lands therein contained were certified over to the State of California. (See List 18, Compl. Exhibit "E," pages 168, 169 and 170; see also Exhibit "F," List 20, pages 170, 171 and 172.)

Two of the same were approved and the land listed March 24th, 1873. (Compl. Exhibit "H," pages 174, 5 and 6.)

Patents were issued by the State viz: to Thomas Murphy for east half Section 21, February 1st, 1871; to Samuel B. Martin for east half of Section 13, February 3rd, 1871; to J. B. Purdy for west half Section 15, March 4th, 1878; to Marshall M. English, for northeast quarter of Section 15, November 9th, 1870; to Samuel Davis for west half of Section 13, April 6th, 1871; to F. D. Wakeman for south half of Section 35, May 18th, 1872, and to C. F. Goodrich for north half of Section 35, May 18th, 1872.

The endorsements on said Certificates of Purchase show that

these grantees from the State each paid to the State the full purchase price of the land and all interest accrued on the same.

The foregoing constitutes the record of the title to lands in this township now sought to be set aside; from its origin and inception down to its completion by patent.

The selections in Township 2 S., R. 1 E., were consummated on the 12th and 13th of June, 1865, on those dates they were entered of record in the State Records, required to be kept by the State officer, and were at his request entered of record by the Register of the United States Land Office on the same dates. These selections then became lawful claims nearly five years before the line of said railroad was definitely fixed, and hence by the express terms of the railroad grant were not impaired or defeated by it. (See Section 3 of an act entitled "An Act to aid in the construction of a railroad," etc., 12 Statutes at Large, page 489, and Amendment to Section 3 of same act, 13 Statutes at Large, page 356.)

These selections had attached to these lands; they were of record in the State and United States Land offices; they were lands that had been otherwise disposed of by the United States under the Congressional grant to the State, before the line of said road had become definitely fixed.

If they were not then lawful claims they were confirmed and made lawful claims by the Act of Congress entitled "An Act to quiet land titles in California," approved July 23rd, 1866 (14 Statutes at Large, 218).

These cases were forwarded to the General Land Office and it was there held and decided by the Commissioner of the General Land Office, and the Secretary of the Interior, that the claim of the State was superior to any other claim, the railroad company included, and therefore they were approved and the land listed and certified over to the State and by the State patented to the purchasers or their grantees or assigns. This is all the mistake inadvertence and wrong complained of in the bill—it is merely an appeal upon an assumed error of law of the Land Department in approving these selections and

listing the land to the State—upon a general charge of mistake, etc., without any specification of fact.

In order to defeat the operation and effect of these selections so completed in June, 1865, and to defeat the validity thereof, and also to defeat the force and effect of the Confirmatory Act of July 23rd, 1866, it became necessary to hold, and the Court below did hold, in effect, viz:

That the filing of the map of the designation of the *general route of the road*, in the office of the General Land Department in Washington, on December 8th, 1864, *had the effect to withdraw these lands from all disposition, under the laws of the United States, and to vest the company with such an interest in the land that neither the Land Department or an Act of Congress could affect it.*

In fact, that the grant then attached to the land.

This extreme doctrine has never been held by any Court in construing the railroad grant of July 1st, 1862, as amended July 2nd, 1864 (12 U. S. Statutes, 489; 13 U. S. Statutes, 356). It is not justified by and is contrary to the *plain terms of the grant itself* and the construction thereof as announced by this Court in *Kansas Pacific Railway vs. Dummeyer, 113 U. S., 629.* In thus holding and deciding the Court was clearly in error.

The amended bill itself shows the following facts: that the map designating the general route of the road as near as may be was filed December 8th, 1864. It does not appear that any actual survey of the line of this road was made earlier than the year 1868. (See Compt. Exhibit B, 1st Exhibit page 1, Volume 2; Defendants Exhibit 56 with official endorsements as to survey of line of road.) That this route of proposed road between Sacramento and San Jose was, on the 31st day of October, 1864, assigned by the Central Pacific Railroad Company to a corporation thenceforth known as the "Western Pacific Railroad Company;" this assignment was ratified by Congress March 3rd, 1865. (Records page 4, folios 7 and 8, Lester's Land Laws 139.)

Up to this date, nothing had been done at all about the

building of the road. On the 21st of May, 1866, the "Western Pacific Railroad Company" obtained a joint resolution of Congress extending the time for the construction of the first *twenty miles* of said road to January 1st, 1867. (2 Lester 203.) The amended bill (page 7, folio 13) shows that it was not until September 29th, 1866, that the president of the road reported that said first twenty miles had been built commencing at the City of *San Jose* and ending at a point near the eastern boundary of *Alameda Canon*. This did not affect the lands in question; they were not abreast of that line of road.

This latter point is shown on Defendants Exhibit 47 (Map of definite location) marked "Vallejo's Mills." This twenty miles of road built from San Jose to Vallejo's Mills does not form and never has in any sense formed any part of the line of the road from Sacramento to the Pacific Ocean or San Francisco. It was from the first and is now operated as a local line from San Jose to San Francisco, via Vallejo's Mills. In the early part of 1868 the Central Pacific Railroad Company of California, having secured its line eastward from Sacramento to the point now known as Ogden pursuant to Section 2, Act of July 3rd, 1866, (2 Lester 162) placed upon the route from Sacramento to San Francisco, not less than ten engineers who first surveyed that line by sections, each of said engineers having charge of a section, to the point known as Vallejo's Mills. (See Exhibit 56, with official certificates and endorsements) From "Vallejo's Mills," now "*Niles Station*," instead of connecting with the road already built to San Jose they continued said line northwesterly in a direct line to Oakland and San Francisco. That line of road, from Sacramento to San Francisco, was and is the main line. The actual work of the so-called Western Pacific Railroad Company ended in 1867 with this 20 mile line from San Jose to Vallejo's Mills. The actual main line from Sacramento to San Francisco was first surveyed in 1868 by the Central Pacific Railroad Company and by it built and completed in 1869 (December 29th, 1869). It was the first indication on the ground of this line of railroad.

The first 20 miles of this line was reported as completed April 28th, 1869. It commenced near the American River

bridge near Sacramento on the line of the Central Pacific Railroad and ran thence southerly (Record Volume 1, page 8) Each 20 mile section of road was reported as a continuation southerly; $103\frac{3}{10}$ miles was so built but it was not shown that this line from Sacramento ever connected with the 20 mile section from San Jose to Alameda Canon.

The work seems to have been done for some reason in the name of Western Pacific Railroad Company. It is obvious that the latter company was a subordinate agency of the Central Pacific Railroad Company of California, and as soon as the main line was completed the former company sunk out of existence; it became merged in the Central Pacific Railroad Company.

We therefore submit that, from December, 1864, until January, 1868, it was optional with said railroad company to extend said line from said Sacramento to San Francisco, on the east or west side of the Sacramento river or adopt any line they pleased. It will doubtless be conceded that they were not bound to adopt the route designated on the map of 1864.

This filing of a map of general route was not a condition precedent or subsequent to be performed by the company on failure of performance of which any rights under the grant would be lost and even the company were not bound to build the road on this route or within the 50 mile area. They could locate the definite line at their option entirely outside this area.

The filing of this map was wholly in the interest of the company, a favor, a measure, which if taken, afforded them partial protection, viz: against some of the reservations and exceptions contained in the grant; it had no retroactive effect; it dealt wholly with the future. It guaranteed them against *three specified things*, viz: First—the legal inception of any preemption claim on any of said lands after that date; Second—that no public sale should thereafter be ordered or made embracing any of said land; and Third—that no private sale or private entry should thereafter be permitted to be made on

these lands. It had no effect on other claims valid or invalid which then existed.

To all who are acquainted with the laws of Congress and the workings of the Land Department relative to the disposal of the public lands know that these words "sale," "private entry" and "pre-emption," each has a distinct, specific and well known meaning. Public sales and private entries were the modes first adopted for the disposal of the public lands. A district of land is advertised to be sold at the door of the District Land Office, commencing on a certain day; the lands are sold to the highest bidder for cash, and such sale is continued for a stated time, when such sales cease; all lands in the district then remaing unsold are subject to private sale or private entry by which any person can go to the Land Office and purchase such of said land as he desires by payment for the same in cash. (See act of May 10, 1800; 1 Lester, page 22, Sections 4 and 5; also Act of April 24th, 1820, Ib., page 34.) The meaning of the term *pre-emption* is too well known to require any explanation.

The meaning of these terms, viz: Sale and private entry, when found in the laws of Congress concerning the disposal of the public lands, have been well known for over eighty years.

We have, under these laws, and still in force, public sales, private entries, pre-emption entries, homestead entries, State selection entries, etc., and each has a distinct and well known meaning, and it is simply a perversion of terms and an imputation upon the intelligence of Congress to say that any one of these specified modes was intended to embrace all modes of acquiring title to public land, or mean any other than those specified.

Our view of the construction of this same Statute was fully sustained by this Court in *Kansas Pacific Railway vs. Dunmeyer, 113 U. S., 629*, but for some unexplained reason this case and our views upon this point were wholly unnoticed and ignored by the Court below in its opinion.

In that case, upon an extention of time to file the map of general route (Act of July 3rd, 1866, 2 Lester, 162, or 14

Statutes, 79,) the provision was that the lands be withdrawn from *sale* only. This is certainly the most comprehensive of all the above terms, but the Court restricted its meaning as well understood in the Federal Statutes when used concerning the disposal of public lands, and held that the 7th Section of the Act of 1862 inhibited only *public sales, private entries and pre-emption settlements* after the filing of this map.

The proviso in Section 7, Act of July 1st, 1862, deals with but two subjects—it provides for the designation *on a map* of the general route, as near as practicable; it provides, further, that thereupon the lands within twenty-five miles on each side of said route shall not be subject to *pre-emption, private entry or sale,* and that when the line of the road is definitely fixed, the land shall be surveyed and set off as fast as may be necessary for the purposes therein named.

There is nothing here tending to show that the grant then in any sense took effect or became attached to any land, or that any right, title, estate or interest became vested in the Railroad Company. This could not be, because by the 3rd Section the power still remained in the United States *to otherwise dispose of these lands* except by way of pre-emption, private entry or sale, up to the *time when the line of the road should be definitely fixed.* Again, the area withdrawn was fifty miles in breadth, ten miles wider than the grant called for, hence it could not then attach, for the area of land out of which the grant was to be satisfied had not been fixed. In the very nature of things, the grant could not attach to any land until the line of the road was definitely fixed.

The condition of the land as to adverse claims and the rights of the Railroad Company to the land is to be determined as of the time when the map of the definite location of line of the road is filed. In the very nature of things this must be so; it could not be known out of what area or tract the company would be entitled to any land until the line of the road became definitely fixed.

The Railroad Company took four years from the time of filing the map of general route in which to survey the line of

definite location, viz: To the latter end of the year 1868; they might have filed their map of definite location at that time, but for some reason it was delayed until February 1st, 1870. But in the present contention that is immaterial whether it was 1868 or 1870.

Our contention with the Court below is vitally important as to lands in this township. The point arises upon its construction of the provisions of the 7th Section of the Act of July 1st, 1862, and the railroad grant itself (Section 3 of the same Act). Upon the making and filing of a map in the Department of the Interior, whereon is designated the general route of said road, as near as may be, it becomes the duty of the Secretary to cause the lands within twenty-five miles of said designated route to to be *withdrawn* from *pre-emption*, *private entry* and sale.

The Court below says that the order of the Secretary which he made, pursuant to the Act of Congress, purported to withdraw the lands from *sale*, *location*, *pre-emption* and *homestead*. (Record, page 56, folio 107; see also page 167, folio 306.)

We presume it will be conceded, that such order will not be construed to have an effect broader than that prescribed by the statute, as it has been held that the filing of the map *ipso facto* operated to withdraw the lands from *pre-emption*, *private entry* and *sale*.

Neither the Secretary or the Court has power to give to the railroad company any greater rights or privileges than such as are prescribed by Congress.

But the Court below holds, in effect, that upon the filing of this map of general route on December 8th, 1864, or at latest, after the order of the Secretary was promulgated, "no right other than that of the railroad company could be acquired or initiated in any of said odd sections of land, * * * * * * nor could Congress even authorize any subsequent legal transfer of title * * * * * * * The filing of the map of general route and withdrawal thereupon from sale, pre-emption etc., protected the lands against the acquisition of any other right by any other parties, until the line should become definitely fixed," etc (Record, page 56). Again the Court says:

"On January 30th (1865), at latest, the grant to the railroad company attached in such manner that it could not be thereafter limited or divested."

Section 3 of the Act of July 1st, 1862 (12 Statute, 489) as amended by the Act of July 2nd, 1864, may be read as follows, viz: That there be, and is, hereby granted to said company * * * * * * every alternate section of public land, designated by odd numbers, to the amount of ten alternate section per mile, on each side of said railroad on the line thereof, and within the limits of twenty miles on each side of said road; *provided, however,* that such of said lands as may have been *sold, reserved* or *otherwise disposed of by the United States,* or to which a pre-emption or homestead claim may have attached at the time the line of said road is definitely fixed, shall not be affected by this grant.

Section 7 may be read as follows, viz: Within three years after the passage of this Act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the land *within twenty-five miles of said designated route* to be withdrawn from *pre-emption, private entry* and *sale;* and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands, hereinbefore granted, to be surveyed and set off as fast as may be necessary for the purposes herein named.

Section 4, Act of July 2, 1864, adds further exceptions, viz: "Any lands granted by this Act, or the Act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land or other lawful claim, nor include any government reservation," etc.

Like Section 3 of the Act hereby amended, we submit these additional exceptions should be deemed such claims as are existing at the time when the line of said road is definitely fixed, unless they belong to the class mentioned in Section 7, Act of July 1st, 1862.

Congress, by the 7th Section, provided that in case the

company filed a map of their general route, any time within three years, the land should, from the date of filing, be deemed withdrawn from *pre-emption settlement* from *public sales* and *private entries*. This has hitherto been the construction of this section by this Court. The Court below treats this as a general withdrawal of the land, while on its face it is expressly limited to a withdrawal from *pre-emption, private entry* and *sale*. On its face it is simply a prohibition against further pre-emption settlements and entries; and against public sales and private entries, and nothing more; it does not purport to inhibit homestead settlements, government reservations or State selections. From and after that date it operated as a limitation upon some of the exceptions in the grant, it inhibited public sales and private entries or private sales and pre-emptions, as those terms are well known in the Federal Statutes. What need of using *those words* if the withdrawal was intended to be general? The Court below makes the statute read "*that the lands shall be withdrawn from all other or further disposition by the United States, or under the laws thereof.*

This Congress did not say, and did not intend to say, and it is a perversion of terms to so continue the language of the statute. But the Court goes a step further and holds in effect that by the filing of this map of general route, in December, 1864, the grant *attached* to the lands in such manner that even Congress had no further power over them. This is another *ipse dixit* of which the opinion is filled.

How can this be true, in the face of the provision in the grant itself, on its equivalent, that the United States may otherwise dispose of these lands up to the time the line of the road is definitely fixed? If the construction of the Court below is sustained as to the effect of the 7th Section, it operates as a complete repeal of all the exceptions contained in the grant itself after the filing of this map of general route.

It is quite evident, we think, that Congress did not intend that all the Federal laws and Congressional grants, and the operations thereunder, should be suspended, within an area of public land fifty miles in breadth across the State, upon this

company filing a map, designating thereon a general route of their proposed road.

This is the doctrine of the Court below; that doctrine made it impossible for the State to perfect its selections in this township entered June 12th, 1865.

The grant to the State expressly authorized the State to make its selections out of the public lands in California. The railroad company was to make its selections out of certain pubic lands, by establishing a definite and fixed line for their road, and we submit that the relative rights of the railroad company and the State, or its grantees, are to be determined by the condition of affairs existing at the time the line of the road is definitely fixed. The railroad company were to receive their donation of land in this forty mile area as it stood at the date when the line of the road was *definitely fixed.*

In *Kansas Pacific Railroad Company vs. Dunmeyer, 113 U. S., page 640*, this Court says: "And these odd numbered "sections were to be those 'not sold, reserved, or otherwise dis- "posed of by the United States, and to which a pre-emption or "homestead right had not attached at the time the line of said "road is definitely fixed.' When the line was fixed, which we "have already said was, by the act of filing this map of defi- "nite location in the General Land Office, then the criterion "was established by which the lands, to which the road had a "right, were to be determined."

The effect of the filing of the map of general route is also considered and discussed in that case. It was these same Acts of Congress that were being considered. Neither the words in the 7th Section, or in the proviso of the amended Act dropping the word *pre-emption* and *private entry* and retaining the word "Sale," the most comprehensive of either of said terms, was deemed to inhibit a homestead entry made after the filing of said map of general route, and such homestead entry was held to be valid although made after the filing of such map.

The Court below utterly ignores the plain provisions of the grant itself, to-wit: that up to the time when the line of the road is definitely fixed these lands may, under the laws, be

sold or reserved or may be otherwise disposed of by the United States, or may be subject to homestead.

The *effect* of the filing of a map designating thereon the general route, as near as may be, is plainly and clearly stated; the language is that for twenty-five miles from said designated route they shall be withdrawn from "*pre-emption, private entry* and *sale.*"

To a person of ordinary legal knowledge and an unbiased mind there would seem to be no trouble in perceiving the intention of Congress—this Statute doubtless means just what it says, viz:

That after this map designating the general route is filed no person can make a valid pre-emption settlement on any odd section of land within twenty-five miles thereof. No person shall be permitted to purchase any of them at private entry, and no public sale shall be ordered or made of any of them.

It was a special prohibition against the origin or inception of any pre-emption claim or any public sale or private sale for money after a certain date, viz: The 8th day of December, 1864, in this case.

It was this, and nothing more. There is no shadow of justification for the doctrine that it gave to the company any vested interest in the land at that date, or any interest. It did give partial protection, as we have shown.

Our contention in this cause, in brief, is this: That by a just and proper construction of the Acts of Congress of 1862 and 1864, donating lands to the railroad company, every adverse claim to any of these lands which was, at the date when the line of the road became definitely fixed, a lawful claim and of record, as such, should be deemed excepted from the operation of the railroad grant; provided, however, that all claims under the laws relating to public sales, private entries and pre-emptions, iu order to be deemed lawful, must have had their inception or origin prior to the date of the filing of the map of general route. The validity of all claims other than the latter is to be tested as of the date when the line of the road is definitely fixed.

This, we submit, is the doctrine of *Kansas Pacific Railway vs. Dunmeyer, supra,* and it is the just and proper construction of the statutes.

It was manifestly the intent of Congress, by this legislation, to preserve and protect all *bona fide* claims to land which were existing when the line of the road was *definitely fixed.*

In July, 1864, it seems to have been thought by Congress that such protection as that afforded by the Act of 1862 was insufficient, and by amendment to Section 3 of the latter Act other exceptions were added, some by specific and some by general terms—such exceptions thereby became a part of the original Section 3, and embodied in it.

Thereafter, said original Section 3, Act of 1862, as to said exceptions, may be read as follows: Excepting from said grant, all of said lands which may have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption, homestead, swamp land or other lawful claim may have attached at the time the line of said road is definitely fixed.

The grant was a most liberal donation to the railroad company—every alternate section of land in an area forty miles in width, extending from the ocean on the west easterly across the State. Wherever the line of road became fixed, the grant was certain to interfere with existing claims; claims under the laws of the United States, including Congressional grants to the State, and many others too numerous to attempt a complete specification.

The Statute, Section 7, secured the railroad company against the inception of any new claims by way of public sales, private entry or pre-emption, after the company should file their map of general route.

As to all other classes of claims not specified in Section seven their validity was to be tested by their status or condition at the time the line of the road was definitely fixed.

Again the reserved right of the government to "otherwise dispose of these lands" up to the time when the line of the road

became definitely fixed, gave full power to the Land Department and to Congress to adjust such claims; and to Congress the power to waive technical defects and to confirm imperfect and even invalid claims, where the equities of the holders seemed to justify such confirmation. We have shown that the real parties in interest, viz: the defendants, as well as the original State purchasers were innocent in reference to any irregularity or defect in these claims, the law of the State justified the selections and the highest Court of the State had pronounced them valid.

The equity of these purchasers was perfect, and is just as perfect now as then.

Under this state of affairs Congress passed the Act of July 23rd, 1866 (14 United States Statutes 218) in which it was enacted "That in all cases, where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State, by any Act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be and hereby are confirmed to said State," etc.

Several exceptions are made to this confirmation in said Section but none in favor of the railroad company although their map of general route was then on file in the General Land Office.

The Court below holds that in July, 1866, nearly four years before the line of this road was definitely fixed the company had become vested with such an interest in these lands that Congress had no power to confirm these selections to the State on behalf of its purchasers.

In effect the Court below makes the filing of the map, designating *the general route of the road as near as may be*, as effectual in cutting of and defeating these claims, as if it had been the map of the line of the road as definitely fixed.

It also makes it so effectual as to render powerless an Act of Congress, made in July, 1866, purporting to confirm such claims.

We submit that on that date the railroad company had no legal estate, right or interest in any of these lands, such as to cut off existing claims, valid or invalid, or prevent Congress from confirming the same or providing for the perfecting of title thereunder.

In these cases the State purchasers had paid the purchase price, as prescribed, to the State for certain specific legal subdivisions of the public lands selected and sold by the State under a Congressional grant, a grant of equal dignity as the raiload grant; and of much earlier date.

The right of these purchasers to protection was stronger and their equities better than the railroad company at that time. Is it conceivable that Congress intended that such equitable and *bona fide* claims should be cut off and defeated by the filing of this map; or that by this act of the railroad company, the Government should be deprived of the power, to otherwise dispose of these lands by confirming such claims and providing for the perfecting of titles to the land so claimed? We submit that this is not and cannot be the true meaning of these statutes, the language is to plain and explict. It declares in terms that none of these lands which may have been otherwise disposed of by the United States at the time the line of the road is definitely fixed pass under the grant. This clearly implies that the Government reserves the power to so dispose of the lands.

It was the manifest purpose of Congress to reserve this power in order to enable the Government to adjust and settle all existing *bona fide* claims, and such power ceased only when the line of the road became definitely fixed.

In all legislation by Congress concerning the public lands, such laws show upon their face that great care is taken that they shall in no case affect or in any way disturb existing claims or the relation in which such claimants stand to the Government. The same solicitude is apparent upon this railroad grant and the purpose of Congress is manifest.

As was said in *Kansas Pacific Railway vs. Dunmeyer, 113 U. S., p. 641:* "It is not conceivable that Congress intended

"to place these parties as contestants for the land with the "right in each to require proof from the other of complete "performance of its obligation."

"Least of all is it to be supposed that it was intended to raise "up, in antagonism to all the actual settlers on the soil, whom "it has invited to its occupation, this great corporation, with "an interest to defeat their claims, and to come between them "and the Government as to the performance of their obliga- "tions."

In the suit, at bar, it is assumed that the railroad company may in its own name, if not barred by the Statute of Limitations, or if so barred, may in the name of the United States at any time cause to be brought suit to determine the validity of every perfected title to any odd numbered section or portion thereof, situate within twenty miles on either side the line of its road, and by filing a bill in general terms, showing a *prima facie* right to the land under its grant, and asserting that such title, whatever its name or nature, was issued by the Government Officials by mistake, inadvertence and wrong the complainant may thereby compel the present holder of such title to show that each and every step taken to acquire such title, from its inception to its consumation, was regular, that all the acts of public officials in relation thereto were also legal and regular and in case of the failure of the defendant to make it appear affirmatively that some public document was on file in a public office twenty-five or thirty years before the trial or that some public officer had not performed his duty as required by law, affecting or not affecting some substantial right, all presumptions in favor of the rights of the defendant are to be disregarded, all Statutes enacted for their benefit are to be set at naught, and his title to be vacated in order that the United States, the complainant as in this case, may do their work all over and give patents to the railway company.

We have shown that by a plain and almost literal construction of the Statutes constituting the railroad grant, these claims are to be deemed valid or invalid according to their status at the time the line of said road was definitely fixed. That this

Court has in effect so decided and held in its construction of this same railroad grant.

As to the date when such line was definitely fixed there is now no contention. The amended bill at page 39 of the Record Volume 1, contains this affirmative averment "that afterwards, "and on, to-wit: the 1st day of February, 1870, the said "Western Pacific Railroad Company filed in the Department "of the Interior a map of the line of its said road as finally and "definitely located and fixed, which map was duly accepted as such "by the Secretary of the Interior; whereupon the line of said "Western Pacific Railroad Companies road became and was "definitely fixed on said 1st day of February, 1870. (See Record, Volume 1, page 142, folio 261.) Six years before that date the land in question, situate in Township 3 S., R. 3 E., had been selected by the proper authorities of the State, in part satisfaction of the Congressional grant of March 3d, 1853, from lands that had been surveyed and platted as a township of public land, then and at all times treated and regarded and since disposed of as public land.

Everything appeared to be and was perfectly regular about such selections, they were recognized and approved by the Register of the United States Land Office in the Unites States Land District, where they were situate, and on the very day of selection entered by him in the proper records of his office, and by the proper officer of the State entered upon the records of the State Land Office. (See Exhibits 7 and 8, page 256 to 257, Record, Volume 1). They were sold by the State in due course to certain purchasers whose names are given in the record (Volume 1, pages 247 to 255) for the price and upon the terms prescribed by the State Law, the State issuing to them a document, made by the law *prima facie* evidence of title and under which they took and retained possession. These claims, afterwards by mesne conveyances were transfered for value to certain of the defendants named herein.

This was the legal status of these claims on February 1st, 1870, so far as the record showed; these defendants being in and thence continuing in possession of the lands and making

improvements thereon. Under the Statute of the United States they were "lawful claims" at that date, and under the decision of this Court, in *Kansas Pacific Railway vs. Dunmeyer, supra*, they had attached to the land and did not at any time pass and and were not affected by the railroad grant.

Some eight years prior to the time when the line of this railroad was definitely fixed, and before the lands in Township 2 S., R. 1 E. had been surveyed under the laws of the United States, the State of California, under Statutes enacted by the Legislature of the State, had made selection of the lands in question in that township, in part satisfaction of the Congressional grant of March 3rd, 1853, and had proceeded to sell the same to certain purchasers whose names are given in the Record (Volume 1, pages 265 to 276). As late as the January term, 1863, these selections on unsurveyed land had been held valid by the highest Court of the State (See *Van Valkenburg vs. McCloud, 21 Cal., 330*). This ruling was reversed at the April term of the Court in 1864 (See *Terry vs. Megerle, 24 Cal., 609*). This township having been surveyed in 1865, and the plat having been returned to the United States Land Office June 10th, 1865, and no conflicting claims having been made, the proper State officials again made application, on or about the 12th day of June, 1865, to select and relocate said lands on behalf of the State under said Congressional grant, such selections were at that date recognized and approved by the Register of the Local Land Office and entered by him in the records of his office. These selections we find entered also by the State officer in his Register of Selection as of the same date (See Exhibit 21 and 22, Record, Volume 1, between pages 276 and 277). One being copy of page of Tract Book, No. 11, United States Land Office, the other copy of page of Register of State Locating Agent, required by law to be kept by him (Statutes of California, 1859, Section 7). This we submit was a valid selection by the State of California.

No one, except the purchasers from the State, had any reason to complain, They had paid 20 per cent. of the purchase money, and interest on the balance of the purchase price for several years in advance of any regular selection by the State.

The re-selections were obviously made on behalf of said purchasers. They necessarily inured to their benefit.

We submit that from and after June 12th, 1865, these selections were valid, and thence forward the claims of these purchasers became and were "lawful claims." They were properly in the category of lands otherwise disposed of by the United States, five years before the line of said railroad became definitely fixed. At that date the equity of these purchasers was perfect. The railroad company had no reason to object, they had done nothing to entitle them to any interest in the land, they were not bound to do anything, it was entirely optional with them then, whether they run the road from Sacramento to San Francisco on the east or west side of the Sacramento river or any route they might select or not at all.

We have devoted more time and space to this subject than, it would seem, was necessary, but it is because we believe it involves the principal error of the Court below, and because the Court entirely ignored the construction put upon these Statutes by this Court in *Kansas Pac.. R'y and Dunmeyer supra* and failed to make any allusion to that case in its opinion, but seemed rather to follow the opinions of Mr. Williamson and Mr. Schurz of the Land Department; in ex-parte proceedings taken by the railroad company or its grantees.

These unofficial opinions were promulgated in 1878 and 1879, from five to eight years after our selections had been approved and the land listed to the State.

The selections in lists 18 and 20 dated respectively September 8th, 1870, and March 11th, 1871, were approved, the former by J. D. Cox, Secretary, the latter by C. Delano, Secretary. The lands in the former were listed by Jos. S. Wilson, Commissioner, the later by Willis Drummond, Commissioner.

The selections in lists 23 and 25 dated respectively November 15, 1871, and March 24th, 1873, were all approved by C. Delano, Secretary, and all listed by Willis Drummond, Com-

missioner. (Record, Volume 1, pages 168 to 176.) These officers had jurisdiction and where acting in the line of their duty, the former were *functus officio*.

It is not pretended that any new facts have arisen since September 8th, 1870, or that any facts were shown to Mr. Williamson or Mr. Schurz that were not shown and considered by Secretaries Cox and Delano and Commissioners Wilson and Drummond. The records of the local and general Land Offices remain the same now as in September, 1870.

The attorneys for the railroad company and its grantees were permitted to introduce into this record an opinion purporting to be signed, "C. Schurz, Secretary," found on pages 192 to 198 of the Record, Volume 1, Compts. Exhibit "Q." It is called "the case of the *State of California vs. M. D. Townsend, et al.*" It should have been entitled the railroad company vs. all claimants of odd numbered sections or portions thereof in Livermore Valley. We had no opportunity to be heard in this matter. In reference to lands in Township 3 S. R. 3 E., it is admitted by the opinion that the township was surveyed and platted in December 24th, 1862, that a copy was forwarded to the General Land Office as surveyed land, but he says "this copy does *not appear* to have been filed in the local Land office."

"The plat filed June 4th, 1869, *I think* must be taken as the official survey of the township and the selections must be treated as having been made on *unsurveyed* land." He might have added "for the purpose of defeating our titles." In this short *ipsa dixit* manner these selections are degraded and the land given to the railroad company; lands upon which *bona fide* purchasers had been residing for fifteen years as has been shown.

The Court will take note that in all these opinions, the "Lewis Survey" is asserted to have marked the exterior boundaries of the Los Pocitas which excluded these lands, and all claims under said grant, but the Court did not see fit to follow this part of the opinions.

The next vice of this opinion is, the doctrine that the rail-

road grant attached and became vested upon the filing of the map of general route in December, 1864, to the odd numbered sections in the fifty-mile area withdrawn from pre-emption, private entry and sale. An area of land ten miles in breadth greater than the grant called for. The language of the Court in *Newhall vs. Sanger*, cited in the opinion, was a mere assumption of the Court in these words: "There can be no doubt that by the withdrawal, the grant took effect upon such odd numbered sections of public lands within the specified limits as were not excluded from its operation." As matter of fact there could be no specified limits until the line of road was definitely fixed. It is apparent upon its face that this was a hasty and ill considered assumption by the Court: we trust we have shown that the Statutes do not bear such a construction.

We submit that it is now the settled doctrine of this Court that the railroad grant attaches to the lands granted, only upon the fixing of the definite location of the line of the road. That the time when such line of the road is definitely fixed as well as the time when the grant attaches, will be deemed to be the date of a filing of a map in the General Land Office showing and designating such line.

In this case we have the admission of record of the filing by the company of a map in the General Land Office on February 1st, 1870. (Volume 1, Record, page 39.)

We produce a certified copy of that map. (See Dfendant's Exhibit 47, Volume 2, Record of Maps, Sixteenth Exhibit.

We have the averment in the bill that this is the map of the line of said road as definitely fixed and that such line became definitely fixed on that date, viz: February 1st, 1870.

We also produce a letter of J. D. Cox, Secretary of the Interior, dated February 1st, 1870, showing the receipt and acceptance of this map and declaring that it will be the basis for the adjustment of the land grant. (See Record, Volume 1, page 142.) Also letter of Jos. S. Wilson, Commissioner General Land office to Register and Receiver giving special directions. See Exhibit 55, Record, Volume 1, page 325.

In addition to *Kansas Pac. R'y vs. Dunmeyer* we cite *Sioux City, etc., Land Co. vs. Griffey 143 U. S., 32, 38,* and cases there cited upon the points presented.

The Railroad Company has not only Stated no Cause of Action, But it now Appears upon the Record that they have no Cause of Action or Cause of Complaint.

The bill as we have seen charges that the Commissioner of the General Land Office, did, on the 8th day of September, 1870; on the 11th day of March, 1871; on the 15th day of November, 1871; and on the 24th day of March 1873, "without right, and through error, inadvertence and mistake, wrongfully list by certified lists thereof," the lands in question to the State of California.

No charge or complaint whatever is made in the bill relative to the *approval of these claims* by the Secretary of the Interior, the officer specially required by the Statute to make such approval and who did make the same.

The Statute (Act of March 3rd, 1853, Section 7) makes it the duty of the Secretary of the Interior to approve or dis-approve these State selections; Congress has not confided this matter to the Land Department, but to the Secretary of the Interior, *eo nomine.* The charge in the bill is aimed specifically at and against a different officer and seeks to challenge a different act, the act of listing alone, and is silent upon the act of the Secretary in approving. This act not having been drawn in question by the bill must be deemed to have been regular and valid.

The selections and claims having been approved by the Secretary of the Interior, as the complainant has shown by its own testimony on the trial, shows that the charge against the Commissioner is not true, as the act of listing was merely clerical, involving no discretion or judgment; it followed the approval as a matter of course.

But, however this may be, the case shows now upon the record, that it was the intention to go back of the approval and listings and back of the record of the United States Land Office and the State Land Office, and make the attack upon our claims in reference to matters existing or non-existing at the date of their origin and inception, viz: 1862, 1863, 1864 and 1865.

We have heretofore sought to show that our demurrer to the bill should, for this reason, have been sustained. Had the bill stated the facts that now appear on this record a demurrer would have ended their case.

The Court below has erroneously assumed that the railroad company had the right to bring suit to have a judicicial determination of these or any claim or claims appearing upon the records of the Land Office as having been allowed and entered of record therein by the proper officer at any time prior to the time when the line of the road was definitely fixed and in such suit to raise any and all questions, as to the regularity of the origin and inception of such claims; this the railroad company or their grantees have, in the name of the United States, been permitted to do in this case and we have hitherto felt compelled to meet such case squarely on the merits from the beginning to the end of all proceedings concerning our titles.

We now assert that upon the construction given by this Court to the railroad grant, and the exceptions therein contained, the railroad company had no such right in respect to the claims herein involved and the Court below erred in that regard.

The 7th Section of the Act of Congress of March 3rd, 1853, donating these lands to the State for the purpose of public schools, provided that the lands taken as indemnity for 16th and 36 Sections "*shall be selected by the proper authorities of the State * * * * * * subject to the approval of the Secretary of the Interior.*" As to the manner and mode of making these selections the federal law is silent, but in order to preserve harmony and prevent confusion and conflict, such selections were always made through the local United States Land Office and the State Statutes so prescribe. (Statutes California 1858, page 249, Section 3; Statutes 1860, page 219,

Section 3; Statutes 1863, page 594, Section 8.) Upon application by the State officer where the lands had been surveyed and plats were in the office, and there were no interfering or conflicting claims, the approval of the Register of the United States Land Office of the selection by the State was evidenced by his entry of the same in the Tract Books of his office.

In effect it was the same as the entry upon the records of a homestead or pre-emption claim. It meant a proceeding in the proper Land Office by which the inchoate right to the land was initiated.

The right of the State to the land thus selected had attached under the Congressional grant and thenceforth it became and was apparently a lawful claim of the State.

It was subject only to approval by the Secretary of the Interior. We show by this record that these lands were so entered, none of them later than June 12th, 1865, about five years before the line of railroad was definitely fixed, and this was the condition of affairs at that time, viz: on the 1st day of February, 1870, the Tract Books of the United States Land Office showed that these lands had been selected by the State of California under the Congressional grant of March 3rd, 1853, at different dates from May 22nd, 1863 to June 12th, 1865.

The only thing remaining to perfect these titles was the approval of these selections by the Secretary of the Interior; upon such approval the listing of the land to the State followed as matter of course, the listing was but a mere clerical act.

As to whether these claims would be approved or dis-approved was no concern of the railroad company or its grantees; they were bound to take notice upon an inspection of the records of the United States Land office that these lands did not pass under their grant. The record showed that they had been otherwise disposed of.

Kansas Pac. R'y vs. Dunmeyer, supra.
Sioux City Land Co. vs. Griffey, supra.
Hastings & Dakota R. R. C. vs. Whitney, 123 U. S. 357.

In such cases the railroad company have no claim or interest for the reason that their grant does not attach to them. Such lands are excluded from the operation and effect of the grant; such is the doctrine of the above cases.

The Railroad Claim is Inequitable.

In conclusion we submit that it is shown by this record that this railroad Company, its grantees and agents, since May 12th 1874, have been carrying on proceedings that are oppressive and unconscionable in their attempt to deprive these people of their lands and homes; lands upon which some of them have resided for over twenty-five years, lands purchased by them in good faith and for which they paid the full market price, lands upon which they have bestowed their labor for years, and upon which they have made permanent improvements, making the land of ten-fold the value it was in 1870. With a full knowledge of these recorded claims in 1870, and prior thereto, they made no move until May, 1874, more than four years after the line of their road was definitely fixed, the road completed and accepted, and the claims of the State approved and the land listed to the State, when they instituted their ex-parte proceedings in the Land Department with avowed purpose of procuring from the officers of the Department, United States patents for these lands. None but a powerful corporation would have the presumption to attempt such a thing, the wonder is that they did not succeed; this attempt seems to have resulted in failure and was abandoned some time about 1880. having been pending about six years. About two years later they made application to the Attorney General who granted them his name and that of the United States to commence and prosecute this suit. How much he knew about the case and how such favors are obtained may be inferred by reference to his letter and that of Mr. Teller, Secretary, found on pages 315 and 316 Record, Volume 1. The Attorney General says, "*I do not undertake to decide whether the Central Pacific Railroad Company or the State of California has the better right to the lands,*

but the facts set forth by the Commissioner of the General Land Office at the request of the Secretary, raise the question which I think should be judicially determined," etc. Evidently this head of the Department of Justice had no opinion and was attempting to avoid all responsibility in the matter.

Immediately upon this order, and other documents being received by Mr. Hilborn, the United States District Attorney in San Francisco, he turned the whole business over to the attorneys for the real parties in interest, to-wit: McShafter, Parker and Waterman, and the case has since been prosecuted the same in every respect as though the real parties in interest were the complainants. Comment would seem to be unnecessary. See testimony of *Hilborn & Waterman, Rec. Vol. 1, pages 143 to 147.*

We submit that the suit savors strongly of oppression, that it is unconscionable and inequitable, that whatever cause of action the railroad company had arose in February, 1870, that this suit brought by them and on their behalf in 1883 was too late, it was barred by the Statute of Limitations of the State of California and was a stale claim; that these defendants are purchasers in good faith and for value and should be protected, that the complainant, the United States, has no interest in the suit; that all the claims on behalf of the State were lawful claims in June, 1865, and some of them long prior to that date and had become attached to the lands long before the line of the railroad was definitely fixed and were not affected by the grant to the railroad company.

Upon the point of the inequity of the case see *Galliber vs. Cadwell and cases cited therein, 145 U. S., 368.* The defendants ask no favors, they only demand justice.

Wherefore the defendants pray that the decree and judgment made and entered herein in the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, on the 5th day of March, A. D. 1889, be reversed and that the bill of complainant be dismissed.

Respectfully submitted,

HENRY F. CRANE,

Solicitor for Defendants.

(NOTE.) We here add to our brief and argument a partial index of some of the more important documents in the Record for a more ready and intelligible reference than the index of the Record contains.

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In Vol. 2 Ex., we have marked the maps in our copy from 1 to 17, the entire number and have so cited them. When so marked they will appear as follows:

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4th. Township plat of Township 3 S. R. 3 E.
5th. Map of Lewis survey of Los Pocitas.
6th. Section of Prof. Whitneys Geological and Topographical map.
7th. Compiled map of three surveys of Los Pocitas.,
8th. Deseno of Los Pocitas.
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SCHEDULE "A."

Date of selections made in Township 3 S. R. 3 E. Township surveyed in field August 1862, platted and survey and plat approved by Surveyor General Dec. 24th, 1862.

	DATE OF SELECTION
The N. W. ¼ sec. 21 and N. E. ¼ sec. 20.....	May 22d, 1863.
The S. W. ¼ sec. 21 and S. E. ¼ sec. 20.....	May 22d, 1863.
The N. W. ¼ the W. ½ of N. E. ¼ and N. E. ¼ of N. E. ¼ of sec. 19—289 19-100 acres.....	June 25th, 1863.
The S. ½ of S. W. ¼ and S. W. ¼ of S. E. ¼ sec. 17 and N. W. ¼ of sec. 20 and S. E. ¼ of N. E. ¼ of sec 19—320 acres.....	May 16, 1864.

Total 1249 19-100 acres—769 19-100 on odd sec. and 480 on even sec.

Application for location and selection made by State Officer at United States Land Office on each of said dates respectively, each selection approved by the Register of said office and entered by him upon the records thereof.

Each of said selections also entered by State Officer in his Register of Selections as of same date.

Between January 25th, 1864 and August 12th, 1865, State sold said lands to four

persons [grantors of defendants] severally by selections, each paying the purchase price prescribed by law.

Selections afterward approved—land listed to State of California and patented to state purchasers.

SCHEDULE "B."

Date of Selections made in Township 3 S. R. 3 E.

These selections originally made under state statutes and in advance of survey of Township by U. S. Surveyor General.

The E. ½ of sec. 21	July 28th, 1862.
The E. ½ of sec. 13	July 25th, 1862.
The W. ½ of sec. 15	June 20th, 1863.
The N. E. ¼ sec. 15 and S. E. ¼ sec. 10	June 20th, 1863.
The N. E. ¼ sec 33	July 20th, 1863.
The W. ½ of sec 13	July 20th, 1863.
The N. ½ of sec. 35	June 13th, 1865.
The S. ½ of sec. 35	June 13th, 1866.

Township surveyed by U. S. Surveyor General and survey and plat approved by him April 6th, 1865, plat lodged in U. S. Land Office June 10th, 1865.

Application for relocation and selection made by State officer of first six of above selections at U. S. Land Office June 12th, 1865. Each of said selections were on that date approved by the Register of said office and entered by him upon the records thereof. Each of said selections were entered by said State Officer upon his register of selections on the same date.

Between June 27th, 1863 and November 28th, 1870, the State sold these lands severally by selections to eight persons [grantors or defendants] each paying the purchase price as prescribed by law. Selections afterward approved land listed to State of California and patented to state purchasers.

1492 U. S. 6

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1892

No. 258.

HENRY CURTNER, J. WEST MARTIN, THE BANK OF CALIFORNIA, ALFRED E. WHITAKER, ET ALS.

Appellants,

VS.

THE UNITED STATES.

SUPPLEMENTARY BRIEF FOR APPELLANTS.

HENRY F. CRANE,
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EDWARD R. TAYLOR,
Of Counsel.

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The W. ½ of sec 13	July 20th, 1863.
The N. ½ of sec. 35	June 13th, 1865.
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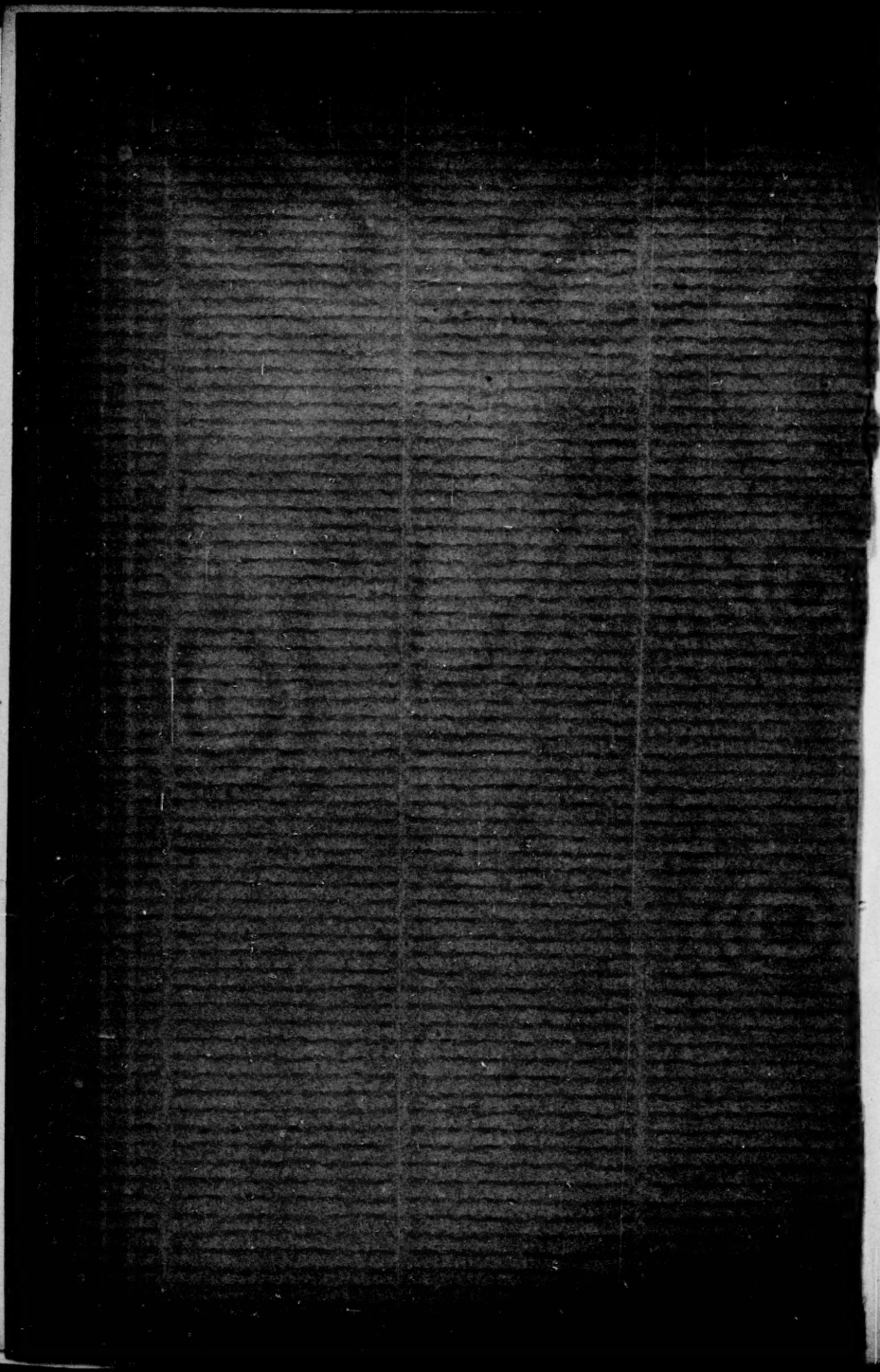

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1892.

HENRY CURTNER, J. WEST MARTIN, THE BANK OF CALIFORNIA, ALFRED E. WHITAKER, ET AL., *Appellants,* *v.* THE UNITED STATES.	No. 258.

SUPPLEMENTARY BRIEF FOR APPELLANTS.

My excuse for making a short supplementary brief herein, is: 1st, that my brief already filed contains no tabulated specification of errors, and 2nd, that in my opinion this case is settled and disposed of already in favor of the appellants by the enunciation by this

Court of its construction of the railroad grant in the following cases, viz.:

Kansas Pac. Ry. v. Dunmeyer, 113 U. S., 629,
Sioux City, etc., Land Co. v. Griffey, 143 U. S., pp. 32 to 39,

and that the matter has not been clearly stated in any former brief herein.

The first of the above cases turned upon the question of the effect upon the railroad grant of the filing of a homestead claim, and the latter of a pre-emption claim, to a portion of an odd numbered section of land, anterior to the time when the line of the railroad became definitely fixed.

In each of said cases it was held by this Court, that by virtue of these entries alone, in the U. S. Land Office, *the claim, attached to the land*, and that when the line of the railroad became definitely fixed, the railroad grant *could not and did not attach to the same land.* And further, that any question as to the validity of such claims, depending upon the acts and proceedings of the claimant, had prior to such entries, were matters and questions exclusively between him and the United States.

That it was of no interest to the R. R Co. what became of the title to such land.

We invoke the same rule in reference to these claims.

It was doubtless the intention of Congress as shown by the exceptions contained in the grant of July 1, 1862, and the amendments thereto by the Act of July 2, 1864, to protect not only the inchoate rights of pre-emptors and homestead claimants, but also all other claimants whose claims had been initiated under the laws of the United States relative to the disposi-

tion of the public lands and at a time prior to the line of the railroad becoming definitely fixed.

It is not conceivable that Congress intended to guard so carefully the pre-emption and homestead claimant and not equally protect the claims of the State of California to lands which had been selected and entered in the U. S. Land Office by the State in part satisfaction of land granted and selected and entered as indemnity, as provided by Sec. 7 of the Act of Congress of March 3, 1853, granting lands in aid of the public schools of the State; especially where such selections and entries had been made many years before the line of said railroad had been surveyed on the ground.

The record shows that none of these lands were selected or entered later than June, 1865, and no line of this road was surveyed until 1868.

The railroad grant of July 1, 1862, excepts from its operation all such odd-numbered sections or portions thereof as *may have been sold, reserved or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may have attached at the time the line of said road is definitely fixed.*

The amended act of July 2, 1864 (13 Stat. 356) declares, that "any land granted by this act or the act to which this is an amendment *shall not defeat or impair any pre-emption, homestead, swamp-land or other* LAWFUL CLAIM * * * *or the improvements of any bona fide settler*," *etc.*

The above shows the great care which was taken by Congress to protect and not even to impair any bona-fide claim, apparently lawful, and existing at the time the line of the road is definitely fixed.

This record (vol. 1, pp 245 to 257) shows, that between the twenty-second day of May, 1863, and the sixteenth day of May, 1864, the land, in question lying in Tp. 3, S. R. 3 E., had been selected by the proper authorities of the State and *entered of record in the U. S. Land Office as indemnity for 16th and 36th Sections.* That such selections and entries had been certified and reported to the State Land Office, and there duly approved and the land sold to divers persons in separate tracts.

Such was the status of the lands in this township after May 16, 1864, and at the time when the line of said railroad became definitely fixed, viz: February 1, 1870.

The same record from pp. 261 to 267 shows, that in the month of June, 1865, the lands in question in Tp. 2 S., R. 1 E., were selected by the proper authorities of the State and *entered of record in the U. S. Land Office* as indemnity for 16th and 36th Sections. That such selections had been approved by the State and the land sold in separate tracts to divers persons. And this was the condition of the record of the State and U. S. Land Offices as to these lands after June, 1865, and at the time when the line of this railroad was definitely fixed on February 1, 1870.

All that remained to perfect title was the approval of these selections by the Secretary of the Interior. The only complaint attempted to be made by the bill is (in effect) that between September 8, 1870, and March 25, 1873, the above selections were approved by the Secretary of the Interior and the land listed to the State and patented to persons who are the grantors of the appellants.

Waiving for the present the absence of any charge or issue in the bill tending to impeach or challenge the validity of these selections, we submit, that under the rule laid down in the two cases cited, the railroad grant could not and did not (by its own terms) attach to any of the land in question at any time.

The right of the State had attached to the land as early as May, 1864, in the former, and June 1865, in the latter township and it so appeared of record.

The term "attached," is defined by this Court in 113. U. S. p. 644, viz: "*It meant a proceeding in the proper land office, by which the inchoate right to the land was initiated.*" This exactly fits our case.

By these selections and entries, a right had fastened to the land which could ripen into a perfect title. Under the law, the State had the right to present these selections for approval to the Secretary of the Interior.

Upon such examination the main questions are, 1st—whether such lands were subject to such selection. 2d—Whether there are any paramount conflicting claims thereto.

By the seventh section of the Act of March 3, 1853, Congress had, in express words, conferred upon the Secretary of the Interior, exclusive jurisdiction to examine these selections and determine these questions, and where no fraud, imposition or mistake is shown such determination should be deemed final.

The theory of this suit necessarily implies that the railroad grant contained in and of itself such inherent force and power that the moment its line became definitely fixed it had the effect to rip up and brush aside all these proceedings on the part of the State, and in effect expunge from the records of the

Land Office these claims, and attach itself to the same lands claimed by the State of California, and all that without any investigation, whatever.

Can it be conceivable that such was the intention of Congress in making the railroad grants?

No! "It is not conceivable that Congress intended to place these parties as contestants for the land with the right in each to require proof from the other of complete performance of its obligation." (113, U. S. p. 641).

Again, this suit assumes that the R. R. Co. have the right to challenge the validity of any and every claim appearing upon the records of the Land Office when the line of their road became definitely fixed, and in this case to come between the State of California and the United States with an interest to defeat these State claims.

Enough appears upon the record to show further, that on the first day of February, 1870, under the laws of Congress and the State, each of these parcels of land had been disposed of to private parties, actual settlers upon the soil and it is *these persons or their grantees* against whom this suit is brought by or on behalf of *this great corporation* with an interest to defeat and destroy *their titles* by coming between them and the government.

This is the very thing denounced by this Court in the cases cited. This record is an apt illustration of railroad and corporation methods in California, and most clearly proves the wisdom of the doctrine of the cases cited.

The lands in question, on the 1st day of February, 1870, appeared upon the records of the U. S. Land Office to have been "*otherwise disposed of by the*

United States." They also appeared upon those records as "*lawful claims.*" Hence the railroad grant did not attach to them. "This filing of the map of "definite location furnished also the means of deter- "mining what lands had previously to that moment "been sold, reserved or otherwise disposed of by the "United States, * * * for by examining the plots "of this land in the office of the Register and Re- "ceiver, or the General Land Office, it could readily "have been seen if any of the odd sections within ten "miles of the line of the road had been sold or dis- "posed of." [113 U. S., p. 640.]

"*In regard to all such lands they were not granted.*"

Here it will be seen that the *criterion* as to what lands are subject to the grant depends upon the status of the lands as shown by the records of the U. S. Land Office, at the time the line of the road is definitely fixed. From the condition of the record as shown, it was of no interest to the R. R. Co. then, whether such selections were ultimately approved or not, and such selections having been afterward approved and the land listed to the State, the R. R. Co. and their grantees still have no interest, because the grant did not attach to them.

Had the R. R. Co. brought a suit for a determination of the respective rights of the State and said Company to these lands, after the line of the road became definitely fixed and before such selections had been approved, basing such suit upon any irregularity or invalidity of the selections, such suit must have failed: 1st, Because their grant had not attached to such land, and 2nd, Because the State had the absolute right to have the validity of such selections

passed upon and determined by the officer in whom Congress had confided that power and duty.

Hence we submit that the Court erred in the following particulars, viz.:

1st. In holding that the title of the R. R. Co. to these lands became vested under its grant upon the filing of its map of definite location or that the title of the R. R. Co. to this land vested at any time.

2nd. In holding in effect that the grant to the R. R. Co. attached upon the filing of the map designating the general route of said road, on December 8th, 1864.

3rd. In overruling the demurrer of appellants to the amended bill.

4th. That the United States is shown to have such an interest in this contention as to entitle it to maintain this suit as the sole complainant herein.

NOTE.—This bill shows that the State of California or its grantees and the R. R. Co. or its grantees claim title under the complainant. No wrong is charged to have been done the complainant or any of its officers; it asks no relief on its own behalf. The bill shows that either the grantees of the State or the R. R. Co. have already the absolute right and title to the lands in question. The bill shows that this is nothing more or less than an ordinary contention between private persons concerning adverse claims to private property and the complainant is not shown to have any interest, and it does not appear to be under any obligation to maintain this suit for the benefit of either of the only real parties in interest.

5th. The Court erred in holding that the statute of limitations of the State of California could not be pleaded in bar of this suit and that such suit is not based on a stale claim.

6th. Also in holding that the appellants as remote grantees of the State, are not entitled to protection in

equity as purchasers in good faith and for value and without notice or knowledge, or the means of knowledgeof said railroad claim.

7th. In holding that said selections or any of them were made from lands that had notbeen surveyed under and in pursuance of the laws of the United States.

8th. In holding that the selections made in 1863, 1864 and 1865 were from lands then claimed under a foreign grant or title and that on the 23rd day of July, 1866, said lands were held and claimed under the Mexican grant Los Pocitas and that the Act of Congress of that date, entitled "An Act to quiet land titles in California" (14 Stat. U. S. 418) did not confirm such selections.

9th. Also in holding in effect that these selections, the approvals thereof and the listing of the lands to the State between September 8th, 1870, and March 24th, 1873, were not confirmed by the Act of Congress, entitled "An Act relating to indemnity school selections in the State of California." Approved March 1st, 1877. 19 Stat., p. 267, ch. 81. (See p. 39 former Brief.)

Wherefore appellants pray that the decree of the lower Court be reversed and the bill dismissed.

Respectfully submitted,

HENRY F. CRANE,

Solicitor for Appellants.

EDWARD R. TAYLOR, Esq.,

Of Counsel.

Office Supreme Court U. S.
FILED.
APR 11 1893
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

No. 258, OCT. TERM, 1892.

HENRY CURTNER ET AL., *Appellants,*

vs.

THE UNITED STATES, *Appellee.*

Argument for Grantees of Defendants, A. E. Whitaker and John R. Deardorff, and S. ½ of T. 2 S., R. 2 E.

MICH. MULLANY,
Of Counsel for said Appellants.

Thomas' Printing House, 207-209 Sacramento St.

In the Supreme Court

OF THE

UNITED STATES.

HENRY CURTNER ET AL., *Appellants*, vs. THE UNITED STATES, *Appellee.*	No. 258. Oct. Term, 1892.

ARGUMENT ON BEHALF OF CERTAIN APPELLANTS.

This argument is presented on behalf of appellants sued under fictitious names, who are grantees of John R. Deardorff and Alfred E. Whitaker for S. ½ of Sec. 35, T. 2 S., R. 1 E.

Statement of the Case.

The United States is the sole complainant in this suit; and the bill of complaint presented in its name is, in substance, as follows:

That on July 1st, 1862, Congress passed an act (generally known as the Pacific R. R. Act) by which the Union Pacific R. Co. was incorporated for the purpose of constructing a railroad and telegraph line from the Missouri River to the Pacific Ocean; and by which it is provided that "there be "and is hereby granted to the said company for the purpose "of aiding in the constructing of said railroad * * every

" alternate section of public land designated by odd num-
" bers, to the amount of five alternate sections per mile on
" each side of said railroad, on the line thereof, and within
" the limits of ten miles on each side of said road, not sold
" reserved, or otherwise disposed of by the United States,
" and to which a pre-emption or homestead claim may not
" have attached at the time the line of said road is definitely
" fixed. * * And all such lands so granted by this section
" which shall not be sold or disposed of by said company
" within three years after the entire road shall have been
" completed, shall be subject to settlement and pre-emption
" like other lands, at a price not exceeding $1.25 per acre,
" to be paid to said company." (12 Stat. at L. 492, Sec. 3).

That the Central Pac. R. Co. of Cal. was in existence under the laws of California at the date of this act, and was, by the act, declared entitled to the benefit of this land grant, on the same terms and conditions as the Union Pac. R. Co.; and, that on Aug. 31st, 1864, the Central Pac. R. Co. of Cal. assigned to the Western Pac. R. Co. the right to earn this land grant along and through the location where the land in controversy is situated; and, that this assignment was ratified by the act of Congress of March 3d, 1865. (13 Stat. at L., 504, Sec. 2).

That, by the act of July 1st, 1862, the railroad company seeking the benefit of the grant, therein provided for, was required, within two years after its passage, to file a map of its general route in the Department of the Interior; and thereupon, the Secretary of that Department should cause the lands within 15 miles of such general route to be withdrawn from pre-emption, private entry and sale; and when any portion of said road should be finally located, the Secretary of the Interior should cause the said lands so

granted to be surveyed and set over as fast as may be necessary for the purposes therein named. (12 Stat. at L., 493, Sec. 7).

That, by the act of July 2d, 1864, the time for filing the general route map was extended to July 1st, 1865.

That a map of the general route of the road was filed in the Department of the Interior on Dec. 8, 1864, and that the Secretary of that Department did, on Jan. 30, 1865, cause the lands within 25 miles of such general route to be withdrawn from pre-emption, private entry and sale; and, that the land in controversy is within those limits; and, that on Feb. 1, 1870, the map of the line of the road, as definitely fixed, was filed with the Secretary of the Interior; and, that on this day the line of the road was definitely fixed. (Rec. p. 39, fol. 74).

That on or before Dec. 29, 1869, the last $20\frac{2}{10}$ miles of the road constructed by the Western Pac. R. Co. was completed in all respects as contemplated by said act of Congress; and that on said 29th day of Dec 1869, said Western Pac. R. Co. was entitled to have and receive patents from the United States (who is alone the complainant) for the land in controversy, the same being within ten miles of the road so completed, "and not sold, reserved or otherwise "disposed of by the United States." (Rec. p. 13, fols. 22–3).

That the Western Pac. R. Co. and the Central Pac. R. Co. of Cal. became consolidated on June 22, 1870, under the name of the Central Pac. R. Co., and that the said Western Pac. R. Co. and its successor the Central Pac. R. Co. did, within 3 years of the completion of the said road, sell and dispose of the land in controversy to persons, other than the defendants. (Rec. p. 4).

That on the 8th day of Sept., 1870, the Commissioner of the Gen. Land Office listed by a certified list the land in controversy, viz: S. ½ of Sec. 35, T. 2 S., R. 1 E., to the State of California; and on May 18, 1872, said State issued a patent for the land, in pursuance of a sale previously made to persons from whom the defendants purchased the land. That the certified list, and listing of the land by the Commissioner of the Gen. Land Office to the State was made "without right, and through error, inadvertence and "mistake." That on May 12, 1874, the Central Pac. R. Co. (which had previously sold and disposed of the lands, as alleged), through an agent, requested the Register and Receiver of the local U. S. Land Office, to certify that a list of lands, embracing said land in controversy, were surveyed public lands of the U. S., and that the State had no valid claim thereto; and that the mistake, inadvertence and error of the Commissioner of the Gen. Land Office, in listing the land to the State, was not discovered by the U. S., or its officers, or land department (who actually did the listing), or by the Central Pac. R. Co., or its grantees, until that 12th day of May, 1874, and that such listing could not have been discovered sooner; but the Reg. and Rec. refused to make or give this certificate. (Rec. pp. 14–15, fols. 25–6).

The defendants in this action are grantees by valid mesne conveyances and purchase of the land thus listed to the State, and patented by the State to the grantor of defendants. (Rec. 16, fol. 28).

That, from May 20, 1874, to Feb. 25, 1878, the Central Pac. R. Co. had been engaged in an attempt to procure patents from the complainant for the land in controversy, and that said attempt became a failure, by the Secretary of

the Interior declining to issue a patent therefor, because of the prior listing of said land to the State; but, that the Reg. and Rec. of the U. S. Land Office at San Francisco did, on said 25th day of Feb., 1878, make a demand on the State to cancel and annul the said listing made to it on the 8th day of Sept., 1870; and that the Attorney-General of the State refused to comply with this demand. (Rec. pp. 18–19, fols. 32–3–4).

That, after considerable further proceedings, in which neither the State or the defendants were parties, or participating at all, on the 6th day of Dec., 1882, the Secretary of the Interior requested the Attorney-General of the U S. to commence suit to set aside the listing to the State of the land in controversy; and thereupon, the present suit was commenced on June 23, 1883, by the U. S , as the sole complainant, to have a decree setting aside and annulling the listing of said land to the State, with costs against, and without terms or compensation to defendants. The State is not a party to the suit. (Rec. p. 19, fol. 34).

To this bill of complaint the defendants interposed a demurrer, to the effect:

1st. That the bill does not state sufficient facts to entitle the complainant, the United States, to any relief in a court of equity, or to maintain this suit against the defendants, or at all, or for or concerning any matters mentioned in said bill—that the bill is devoid of equity.

2nd. That it appears on the face of said bill that the complainant has no interest in the subject matter of the suit, and no title or right to institute or prosecute a suit concerning it.

3rd. That the grantees of the Central Pac. R. Co. and the Western Pac. R. Co. are not joined with the complain-

ant, or parties to the suit, whilst they alone are the real parties in interest, and that the object of the suit is solely for their benefit.

4th. That it appears on the face of the bill that the listings by the U. S. to the State of the several tracts of land described in the bill were made at several and separate times to the State, and that the patents from the State for the said several lots and tracts of land were made to different and several persons who are each independent of the other, and not at all jointly interested with each other in or concerning said several tracts.

5th. That it appears from the face of the bill that the cause of action, set forth therein. such as it is, is barred by the provisions of Sec. 338, Subd. 4, of the Code of Civil Procedure of the State.

6th. That it does not appear from the face of this bill what the error, inadvertence or mistake was, or what the facts are which constitute the same, by which the Commissioner of the Gen. Land Office listed said lands, or any of them, to the State. (Rec. pp. 24–6).

This demurrer was overruled, and the defendants answered. (Rec. p. 27 *et seq.* and p. 40 *et seq.*)

Upon the trial, under the issues made and the defenses set up in the answer, it was shown and proven that, in the year 1839, the Mexican Government made a grant to Noriega and Livermore of a certain tract of land known by the name Las Pocitas; and that this grant was approved by the Departmental Assembly of the Mexican Government on June 10th, 1840; and, that on Feb. 27, 1852, the claimants, Noriega and Livermore, presented said grant with a petition for its confirmation to the U. S. Land Commission; and that on Feb. 14th, 1854, the grant was confirmed by the

U. S. Land Commission; and that the grant, as thus confirmed was thus described, viz.: "The lands, of which con-
" firmation are hereby made, of Las Pocitas, are bounded
" and described as follows, to wit:

" On the north by the Lomas de las Cuevas; on the east
" by the Sierra de Buenos Ayres; on the south by the divid-
" ing line of the establishment of San Jose, and on the
" west by the rancho of Don Jose Dolores Pacheco, con-
" taining in all two square leagues, a little more or less.

" Reference for further description to be had to the map,
" marked C, and filed in this cause." (Rec. p. 283, fol. 500).

That on Feb. 20, 1855, an appeal was taken from this decree by the United States to the U. S. District Court for the northern district of Cal., and on the 18th day of Feb., 1859, the said U. S. District Court affirmed the decree of the Land Commissioner in all things, and confirmed the grant in the words and by the description following, viz:

"The land of which confirmation is hereby made, is
" known as Las Pocitas, and is bounded and described as
" follows, to wit.: On the north by the Lomas de las
" Cuevas, on the east by the Sierra de Buenos Ayres, on
" the south by the dividing line of the establishment of
" San Jose, and on the west by the rancho of Don Jose
" Dolores Pacheco, containing in all two square leagues;
" provided that quantity be contained within the boundaries
" named, and if less than that quantity be contained therein,
" that that less quantity is hereby confirmed. Reference
" for further description to be had to the map marked C,
" filed in this case." (Rec. p. 287, fols. 506–7).

That an appeal was taken from this decree of the District Court to the Supreme Court of the United States, and that during the Dec. term of 1860, viz.: on Jany. 24, 1861, the

decree of the District Court was affirmed. (Rec. p. 288, fol. 509).

That a copy of the mandate from the U. S. Supreme Court, containing a copy of the decree of the District Court thus affirmed, was placed on file in the office of the U. S. Sur. Gen. for California; and on Sept. 21, 1865, the Sur. Gen. directed E. H. Dyer, a U. S. deputy surveyor, to make a survey of said Mexican grant "in accordance with " the requirements of the law and the said decree of con- " firmation," and inserted in the instructions to him, a copy of the description of said grant, as thus confirmed by the U. S. Supreme Court. (Rec. p. 290, fols. 513–514).

Thereupon, said E. H. Dyer, U. S. deputy surveyor, proceeded and made the survey of said Mexican grant as directed, and from his survey constructed a plat or map and the same was, on Feb. 8, 1867, approved by the U. S. Sur. Gen.; and in July, 1868, the Commissioner of the Gen. Land Office held that, in accordance with the rulings of the Land Department, said survey " must stand as the recog- " nized survey for patenting." (Rec. p. 297 fol. 523).

Therupon, said survey and plat were presented to the Secretary of the Interior for his action; and on July 30, 1868, he refused to approve it, on the ground that it embraced too much land. He said in his ruling: "This " is a sobrante grant, and the court confirmed the same as " containing in all two square leagues, provided that " quantity be contained within the boundaries named; and " if less than that quantity be contained therein, then that " less quantity is hereby confirmed;" and ordered that, by a new survey, the quantity be reduced to two square leagues. (Rec. p. 297, fol. 523).

Then followed a series of exertions on behalf of the

claimants of said grant to have the decision of the Secretary disapproving of said survey reconsidered, and to have the same approved. (Rec. pp. 301–3, fols. 527–531).

The contention arose in this behalf under the terms or context of the description of the grant. The heirs of Livermore contended strenuously that the grant was co-extensive with the boundaries named in the decree of confirmation, irrespective of the quantity contained within these boundaries; and, to sustain that contention, relied on the authority of U. S. *vs.* Pacheco, 22 How. Rep. 225. (Rec. pp. 295–6).

A reconsideration of the decision having been denied, the U. S. Sur. Gen. made a new survey of said grant within the boundaries designated in the decree of the District Court, affirmed as before stated; and he approved of the same on May 11th, 1870, and forwarded the same to the Commissioner of the Gen. Land Office, who approved of the same on March 1, 1871; and the Commissioner in turn forwarded the same to the Secretary of the Interior, who approved of it on the 6th of June, 1871. (Rec. pp. 303–305, fols. 531–533).

In May, 1872, a patent was issued by the U. S. upon the survey last mentioned.

The land in controversy, viz: S. ½ of S. 35, T. 2 S., R. 1 E., is included within the description contained in the decree of the U. S. District Court, of said Mexican grant; and is also included within the survey and plat made of said grant by deputy U. S. Surveyor Dyer in 1865, but is not included within the survey lastly mentioned, for which a patent was issued to Livermore's heirs. (Rec. Maps "F. F." and "Exhibit Hopkins" and No. 56, and "KK" and No. 15, and Test. of Hopkins and Martin and others, p. 83

et seq. fols. 157 *et seq.*, and Dec. of lower Court, p. 58, fols. 111-12).

On July 30, 1870, the Com. of the Gen. Land Office instructed the Reg. and Rec. of the U. S. Land Office at San Francisco, Cal., upon proceedings presented for his action, that they should decline to receive any application whatever for lands within the exterior boundaries of the Mexican grant, Las Pocitas, until they should receive further notice from the office of the Commissioner, of the release of the lands from suspension; the lands within said exterior boundaries of said grant being suspended until the final survey should be finally approved, which, as before stated, occurred on the 6th day of June, 1871. (Rec. 257, fols. 458-9); because the heirs of Livermore were still exerting themselves to have the decision of the Department of the Interior of 30th of July, 1868, reconsidered, and thereby seeking to have the Dyer survey (so called) made in 1865, confirmed for the lands embraced within the same, and which included the land in controversy here. (Rec. p. 257, fol. 459).

The suspension of lands thus reserved for the satisfaction of this Mexican grant was removed on June 14th, 1871, by a letter of that date from the Com. of the Gen. Land Office to the Reg. and Rec. at San Francisco, Cal. (Rec. p. 258, fol. 460).

In March, 1865, T. 2 S., R 1 E., was, by the U. S Sur. Gen. for Cal , surveyed in the field, and subdivided into sections and quarter sections and constructed into a plat; and on the 6th day of April, 1865, the field-notes and plats were, by said Sur. Gen , approved and placed in his office, where the same have ever since been and now remain; and a duplicate of the plat was filed in the U. S. Land Office at

San Francisco, on the 10th of June, 1865. (Rec. p. 260, fol. 463, and also Map V).

On the 22d of Sept., 1865, application was made by F. O. Wakeman to the State agent for Cal. for the purchase from the State of the S. ½ of S. 35, T. 2 S, R. 1 E.; and on the 24th of December, 1865, said State agent, in pursuance of State laws, located the land in lieu of the W. ½ of S. 16, T. 4 S., R. 1 E. (which was lost to the State, being within a private grant,) for the use of said Wakeman, by filing an application on behalf of the State for the same in the U. S. Land Office with the consent of the Register of said Land Office. (Rec Exs. 21 and 22, pp. 276–7); and the application was entered in the tract book of the U. S. Land office.

This location was approved by the State Sur. Gen. on Nov. 26, 1870, and on Dec. 9, 1870, the Reg. of the State Land office issued to said Wakeman a certificate of purchase for said S. ½ of S. 35, in due form; and on the 18th of May, 1872, the State issued a patent for said land to said Wakeman, under whom certain of the defendants in this suit became purchasers and grantees (and on whose behalf this argument is presented).

That said S. ½ of S. 35, T. 2 S., R. 1 E., was listed or certified over to the State of Cal. by the U. S. Land Department on Sept. 8, 1870, in lieu of the ½ of said 16th Section lost to said State. (Rec. p. 276, fol. 489).

On April 5, 1854, John C. Hays, U. S. Sur. Gen. for Cal., instructed Wm J. Lewis, a deputy U. S. surveyor, to make what is called a preliminary or initiatory survey of this grant, stating in his instruction that three persons named, who represented themselves as attorneys of Robert Livermore, applied to his office for a survey.

This initiatory or preliminary survey was accordingly made by Mr. Lewis and approved by Mr. Hays, U. S. Sur. Gen. Cal., on June 19, 1854. (Rec. pp. 200-216, fols. 316-385).

This survey was not again heard of or mentioned for any purpose for over 18 years after it was made, or until after the patent was issued to the heirs of Livermore for the final survey of the Las Pocitas grant; and during which period of over 18 years, the grant underwent adjudication before the U. S. District Court and U. S. Supreme Court, and also underwent two surveys with a view to the issuance of a patent on each, and underwent much consideration before the Land Department. But for some reason or other not explained, this preliminary or initiatory survey was delineated in extra heavy lines, on Professor Whitney's geological map, by one J. H. Wildes, an assistant draftsman in the office of the U. S. Sur. Gen. for Cal., *over three years after this suit was commenced and about three months before the trial.* This draftsman was called as a witness on behalf of complainant. (Rec. pp. 121-3). When this geological map was made, however, in 1867, the true delineation of this Mexican grant was placed upon it, viz: the Dyer survey, and none other, which embraced the land in controversy. (Rec. p. 123, fol. 227, and Map Ex. 29).

The Las Pocitas grant is laid down and delineated by the Western Pac. R. Co. on the map of definite location of its road, filed in the Gen. Land Office on Feb. 1, 1870, in accordance with the Dyer survey of 1865, which embraces the land in controversy as a part of that Mexican grant. (Rec. Map, Ex. 47).

And again, this grant is delineated and laid down by the Central Pac. R. Co. on its map of construction of road be-

tween stations, filed in Gen. Land Office Feb. 27, 1873, in accordance with the Dyer survey of 1865. (Rec. Map, Ex. 56).

According to the face of the record here, the Cen. Pac. R. Co., and its assignor, the Western Pac. R. Co., had expressly recognized and stated on their own documents as late as Feb. 27, 1873, that the land in controversy formed part of the Mexican grant Los Pocitas, and made no claim thereto prior to May 12, 1874. (Rec. pp. 177–80, Maps Exs. 15 and 56).

Argument.

Upon the record thus briefly summarized we beg leave to submit the following brief argument:

I

The United States cannot maintain this suit against the appellants, and the demurrer should have been sustained and the bill ordered dismissed.

The U. S. shows that it has no interest whatever in the subject of its complaint. It merely voices the complaint of private persons (the grantees of the R. R. Co.) against other private persons. It does not complain *for itself*. So disinterested is it, that it has exacted a bond from the persons whose cause it has undertaken to champion and promote, to be saved harmless from costs and expenses, (Rec. pp. 316-7), and has left the prosecution of the suit to the direction and control of those private parties and their private attorneys.

No error, inadvertence, wrong, fraud or concealment is charged to have been committed by any of the defendants or any of their grantors, or by any agent or officer of the

State. The U. S. complains only of itself and of its own actions; and in this behalf, that it has already deceived and committed a wrong against appellants, and that by the use of its name and its privileges as complainant, instead of the parties whose cause it is promoting, it prays that another and more serious wrong be now committed on appellants. To explain this charge: it is alleged that complainant (acting through its only mode of action, its officers), listed the land in controversy to the State on Sept. 8, 1870, (Rec. p. 13, fol. 23); and that on May 18, 1872, the State conveyed the land to F. O. Wakeman, and that appellants are grantees of Wakeman by valid conveyances, prior to the commencement of this suit (Rec. p. 16, fol. 28); and that on Feby. 25, 1878, complainant (through its officers) " made " demand on the State of California for the surrender of " the certification by the Commissioner "; and, on April 1, 1878, the State Attorney-General refused to comply with the demand. (Rec. p. 18, fols. 32–3). This suit was commenced on July 23, 1883; and, the State is not even a party to it. Naturally enough, the State refused this demand, if for no other reason than that it had parted with all interest in the land nearly 6 years before the demand was made. Then, after over 18 years from the time complainant received and registered the State application for the land to be listed to it as lieu land, and after nearly 13 years from the time complainant listed the land to the State, and over 11 years after the State had conveyed it to defendants' grantor, and after the defendants have reclaimed, improved, cultivated, fenced and built upon the land, the complainant seeks to turn over their homes, land, improvements, etc., without compensation or conditions to unnamed grantees of the R. R. Co.

This very statement, brief and simple as it is, is sufficient to cause any sensible and just man to startle.

Nor is this all that can be said in this behalf. It is alleged that the line of the road of the Western Pac. R. Co. was definitely fixed on Feby. 1, 1870, (Rec. p. 39, fols. 74–75), and that the road was completed and accepted by the Government and the R. R. Co's right to its lands fully accrued on Dec. 29, 1869, or at latest, on Feby. 1, 1870. (Rec. p. 13, fols. 22–3).

Assuming that the land was not "sold, reserved or otherwise disposed of," etc., at the time the line of the road was thus definitely fixed, the title to the land became vested *then* in the R. R. Co., *without the issuance of any patent*, as fully as it was possible for it to become vested. Under the provisions of the Pacific R. R. Acts, the title does not pass or become vested by the patent; the title vests and passes by virtue of the act itself, as a grant *in præsenti*, upon the performance of the conditions and acts prescribed by the act, and the patent serves only as *prima facie evidence* that the title had previously passed to and vested in the R. R. Co. But, evidence of the performance of the acts and conditions prescribed by the act, would be just as good as the patent for the purpose of showing title in the R. R. Co.

Desert Salt Co. vs. *Tarpey*, 142 U. S. Rep., 241; and the cases there considered and cited;
Jatum vs. *Smith*, 95 Cal. R., 155;
Denny vs. *Dodson*, 32 Fed. Rep., 899;
Forrester vs. *Scott*, 92 Cal. Rep., 398;
Soux City Co. vs. *Griffey*. 143 U. S. Rep., 32;
New Orleans R. Co. vs. *Parker*, 143 U. S. Rep., 42.

In short, it was this Act of Congress, *itself*, and *not* the patent subsequently issued, which conveyed the title to the

R. R. Co. for the lands granted. At most, the patent, when issued for lands granted by the act, is but mere *prima facie evidence* obtained on *ex parte* application from ministerial officers, of a *prior conveyance* or investitute of the title made by Congress through the act itself.

Schulenberg vs. *Harriman*, 21 Wall. R., 58;
Missouri Ry. Co. vs. *Kansas Ry. Co.*, 97 U. S. Rep., 497;
Van Wyck vs. *Knevals*, 106 U. S. Rep., 370;
Wright vs. *Roseberry*, 121 U. S. Rep., 488;
Railroad Co. vs. *Baldwin*, 103 U. S. Rep., 427;
Leavenworth Ry. Co. vs. *U. S.*, 92 U. S. Rep. 743.

It would be a grant *in praesenti* even if the wording of the act were less expressive in that behalf than it actually is.

Rutherford vs. *Greene's Heirs*, 2 Wheat. R., 196;
Langdeau vs. *Hanes*, 21 Wall. R., 521;
Stark vs. *Starrs*, 6 Wall. R., 402.

Hence a party holding the railroad title to lands granted by the act, could, from the time the line of the road was definitely fixed, and the completion of the road, maintain his action at law or in equity for or concerning the lands, as well before as after the issuance of the patent.

Van Wyck vs. *Knevals*, *supra;*
Missouri Ry. Co. vs. *Kansas Ry. Co.*, *supra.*

And if the land was not in fact, and according to the provisions of the act of Congress, granted to the R. R. Co. the patent would not confer any title, and would be void.

Doolan vs. *Carr*, 125 U. S. Rep., 618, and the numerous cases there cited and commented on by the Court.

According to the allegations of the complaint, the title to the land in controversy vested in the R. R. Co., if it vested

or can ever vest at all, on or before Feby. 1, 1870; and over 13 years elapsed before this action, or any proceeding whatever, was commenced against defendants concerning this land.

If the R. R Co. or its grantees had brought the action of ejectment against defendant to recover possession of the land at any time since Feb. 1, 1875, the defendants could successfully plead the statute of limitation to such an action. See

Sec. 318, *Code Civ. Pro. of Cal.;*
Jatunn vs. *Smith*, 95 Cal. 155, *supra.*

But in order to deprive the defendants of the benefits of the laws of the State, the U. S. has taken up the cause of the grantees of the R. R. Co. to relieve them from the effects of the statute of limitations, and to deprive defendants of the land which was listed to their grantor by the U. S, as well as of their improvements thereon, etc. In substance the U. S. says:

Defendants, I know that I listed this land to the State so that you might buy it from the State, build upon it, improve it and look upon it as your homes, and I thereby deceived you, and I know that the error or inadvertence by which the listing took place is not at all attributable to you or your grantor, and I know that you have been in possession more than double the period required to give you a perfect title under the laws of your State; See

Bicknell vs. *Comstock*, 113 U. S. Rep., 149;
Arrington vs. *Liscom*, 34 Cal., 366;
S. C. 94 *Am. Dec.* 722, and notes;
Espinosa vs. *Gregory*, 4 Cal., 58;
318 *Co. Civ. Pro. of Cal.*

and now, after luring you on by false lights, I espouse the

cause of the grantees of the R. R. Co. so that I may perpetrate a second wrong upon you by depriving you of the right to plead limitation, and thereby deprive you of your land, your homes and your improvements; and it is a court of *equity* that I invoke to sanction my partiality to the grantees of the R. R. Co. and my prior deception and subsequent wrong towards you.

There is not a single authority cited by the lower Court to sustain the right of the U. S. to maintain this suit. And there were two cases brought to the attention of the Court which, we submit, are sufficient authority for the dismissal of the bill, viz:

U. S. vs. *Beebe*, 127 U. S. Rep., 338; and
U. S. vs. *San Jacinto Tin Co.* 125 U. S. Rep., 273.

In the latter case the U. S. patent was sought to be set aside on the ground of fraud practiced against the U. S. by those who obtained the patent, and if set aside, the land would, to that extent, belong to the U. S. Thus, the U. S. was directly and alone interested in the subject matter as against the defendants, and the latter were charged with fraud in having procured the issuance of the patent to themselves. Under these circumstances, the Court held that the U. S. had the right to institute the suit. "But," said the Court, "we are of opinion that since the right of the Gov-
"ernment of the United States to institute such a suit
"depends upon the same general principles which would
"authorize a private citizen to apply to a court of justice
"for relief against an instrument obtained from him by
"fraud or deceit, or any of those practices which are
"admitted to justify a Court in granting relief, the govern-
"ment must show that, like the private individual, it has
"such an interest in the relief sought as to entitle it to

" move in the matter. If it be a question of property a " case must be made in which the Court can afford a remedy " in regard to that property; if it be a question of fraud " which would render the instrument void, the fraud must " operate to the prejudice of the United States; and if it is " apparent that the suit is brought for the benefit of some " third party, and that the United States has no pecuniary " interest in the remedy sought, and is under no obligation " to the party who will be benefited to sustain an action for " his use; in short, if there does not appear any obligation " on the part of the United States to the public, or to any " individual, or any interest of its own, it can no more sus- " tain such an action than any private person could under " similar circumstances." But, if "*the fact is manifest that* " *the suit has actually been brought for the benefit of some third* " *person, and that no obligation to the general public exists* " *which requires the United States to bring it, then the suit must* " *fail.*"

The case of *U S.* vs. *Beebe, supra,* is even more applicable to the case at bar. There it is said: "If a patent is wrong- " fully issued to one individual, which should have been " issued to another, or if two patents for the same land " have been issued to two different individuals, it may " properly be left to the individuals to settle, by personal " litigation, the question of right in which they alone are " interested."

It was there held that in cases where the U. S., although a nominal plaintiff, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person. the defenses of laches and the statute of limitations are available, the same as in suits between private individuals.

The listing of land to the State is the equivalent of the patenting of it to an individual.

It is therefore submitted that the maintenance of the suit at bar should not be sanctioned; that it is contrary to the spirit and impartial justice of the Constitution and laws of the U. S. to permit its name, its prerogatives and exemptions to be used and exercised by one private party against another private party. Both, the grantees of the R. R. Co. and the grantees of the State, claim under the U. S., according to the face of the complaint, and the U. S. makes no claim for itself. Therefore, no reason appears why the U. S. should promote the cause of either as against the other. If the grantees of the R. R. Co. acquired a title to the land in controversy on Feby, 1, 1870, or at any other time, let them assert their alleged title as they may be advised; but let the U. S. keep its hands off and not deprive defendants of any legal defense which exists in their favor, under the laws of the U. S. or the State of California.

The books present cases, almost innumerable, where both contestants are private parties and where both claim title to land under the laws of the U. S. and of its governing officers, and where the U. S. would have as good (perhaps better) reason to espouse the cause of one as against the other as in the suit at bar. But, such partiality and consequent injustice has never been thought of, and is totally inconsistent with the duties of the Government.

II.

The bill is fatally defective in several respects, among which we will specify the following.

A. Complainant avers "that on and after said 29th day "of December A. D. 1869, said The Western Pacific Rail-

" road Company was lawfully entitled to have and receive " patents of the United States of America " for the land in controversy. (Rec. p. 13, fols. 22-3.)

True, this is but the statement of a legal conclusion, and entitled to no consideration as a part of the pleading. But, taking it as it is, it would mean that the title vested in the R.R. Co. on December 29, 1869; and, from that would follow the conclusion that the listing of the land to the State on September 8, 1870, was void, and formed no impediment to the issuance of a patent by the U. S. to the R.R. Co., and under that theory this suit is useless and should be dismissed.

But the general theory of the bill is contrary to this, and is to the effect that the *title* passed to the State by the listing on September 8, 1870, and that the listing was a valid act. This theory is, however, more dangerous to the pretensions of the R.R. Co. and its grantees; because, if the title was subject to be passed by the listing to the State on September 8, 1870, it is because the title was *not then* vested in the R.R. Co., and if not then vested in the R.R. Co.,, it is because the land must have been sold, reserved or otherwise disposed of at the time the line of the road was definitely fixed, viz.: on or before February 1, 1870.

This bill is uncertain on this most essential subject. Bu whichever way it may be taken, we submit that it is fatally defective.

B. The grantees of the R.R. Co. should have been made complainants in this suit. The laws of the State provide that every action must be prosecuted in the *name* of the real party in interest.

Sec. 367, *Code Civil Pr cedure of Cal.*

Swift vs. *Swift*, 46 *Cal.*, 269-70.

But, we are inclined to say that the grantees of the R.R. Co. should not only be complainants here, but they should have been the *sole* complainants in seeking the relief which this bill aims at. The U. S. has no interest in the subject.

C. The State is most directly interested in the subject of, and relief sought by this action. It was on the State, as alleged, that the demand was made, prior to suit, for the relief sought by the suit. True, the State cannot be sued or made a party without its consent. But, nevertheless, this suit was instituted on the order of the Secretary of the Interior directed to the U. S. Atty.-Gen. to "set aside the *title of the State* of California to the lands" in controversy. This order was given on December 6, 1882. (Rec. p. 315, fol., 551.)

But the suit is not against the State, nor is it brought to set aside the *title of the State*, and the State is not even a party to it. Plainly, if this suit should prevail as prayed for, it would result in a reckoning between the U. S. and the State as to the land in controversy, and result also in another reckoning between the State and the defendants as to the purchase price paid by them to it. So, the State is an indispensable party to the suit; and hence we urge that the demurrer should have been sustained and the bill dismissed on this ground, if on no other. See

Cunningham vs. *Railroad Company*, 109 U. S. Rep. 446.

Elliot vs. *Wiltz*, 107 U. S. Rep., 711.

D. No reason appears why all the defendants should be joined in this one suit. The tracts of land involved are separate and distinct from each other. Each separate tract has its separate claimant, and the dates of surveys, loca-

tions, listings, &c., are different from each other. No doubt, this difference as to the standing, rights and claims of some of the defendants from others will appear from their briefs and arguments.

In this behalf, if this suit can be sustained, there is no reason why all lands within the District of California and all claimants to such lands under State locations similar to those mentioned in the bill in this suit might not be united in the same suit, irrespective of the absence of common interest in each other's respective rights, standing and defenses.

E. It is alleged that the land in controversy was listed to the State by the Commissioner of the General Land Office, through error, inadvertence and mistake, wrongfully and without right. (Rec. p. 13, fol. 23.)

This mode of complaint is entirely insufficient. The facts constituting the error, the inadvertence and mistake, or the wrong, should be stated. Which was this alleged error, &c., one of fact or one of law? If one of fact, the defendants should be apprised as to what the facts are. If one of law, that should be presented in like manner by alleging the facts from which the erroneous, mistaken, etc., conclusion of law was drawn and followed. See,

Green vs. *Palmer*, 15 Cal., 412.

So it is submitted that the demurrer should be ordered sustained and the bill dismissed.

III.

The testimony adduced on the whole case proves that the Railroad Co. has not and never had any right or title to the land in controversy.

In considering this contention, we must not lose sight of the fact *that the complainant seeks no relief for or on account*

of itself. It does not claim that it has any interest whatever in the land in controversy. The object of the suit is to establish that the land passed to the R. R. Co., as part of the grant made, or provided for, by the Pac. R. R. Acts of July 1, 1862, and July 2, 1864. *So, if the land did not pass to the R. R. Co., it is quite immaterial in this suit whether the listing of the land by the U. S. to the State was regular or irregular, valid or invalid. The U S. is merely complaining for the grantees of the R. R. Co., and enlisted in a judicial expedition to quiet the title, and prepare the way for furnishing future evidence (by way of a patent) that the title vested in their grantor, the R. R. Co., on Dec. 29, 1869, when, it is alleged, the R. R. Co. was entitled to a patent.* (Rec. p. 13, fols. 22–3).

Hence the true and only question to be answered is, did the title to the land vest in the R R. Co. under the Pac. R. R. Acts? If it did not, then there is no title in the grantees of the R. R. Co. which can be quieted, or for which they should be furnished with evidence of title (a patent).

Any land that was sold, reserved or otherwise disposed of at the time the line of the road was *definitely* fixed, did not pass to the R. R. Co.; and even if it should procure the issuance of a patent for such lands (as it frequently did) the patent would be void, and could be shown to be void whenever or wherever presented as evidence.

Doolan vs. *Carr*, 125 U. S. Rep., 618;

Leavenworth R. Co. vs. *U S.*, 92 U. S. Rep., 733, and numerous other cases referred to in the judicial opinions prepared in these two cases.

The map of definite location of the line of the road of the Western Pac. R. Co. was filed in the General Land Office on Feby. 1, 1870, although the road was completed on or

before Dec. 29, 1869. (Rec. pp. 11, 12, 165 and p. 39 and Ex. 47).

The line of the road was, therefore, definitely fixed on Feby. 1, 1870.

Pac. R. Co. vs. *Dunmeyer*, 113 U. S. Rep., 629;
Sioux City, etc. vs. *Griffey*, 143 U. S. Rep., 38.

But, it is immaterial here which of the two dates, viz: Dec. 29, 1869, (when the road was completed) or Feby. 1, 1870, (when the map of definite location was filed), shall be taken as the date on which the right of the R. R. Co. attached to such lands as were granted to it.

In the case at bar the land in controversy did not pass to the R. R. Co., and the right of the R. R. Co. never attached to it, because it was held and claimed under a valid Mexican grant from the year 1839 until June 6, 1871; and, of course, the grantees of the R. R. Co. have no greater interest than their grantor.

Carr vs. *Doolan, supra;*
Kansas Pac. R. Co. vs. *Dunmeyer, supra,* and many other cases of like tenor.

The land was held and claimed in this manner also when the map of general route of the road was filed on Dec. 8, 1864. (Rec. p. 6, fol. 9, Map B).

It is a general, if not an unexceptional, rule that a plaintiff must recover, if at all, on the strength of his own title, and not on the weakness of defendant's title.

Reynolds vs. *Iron Co.*, 116 U. S. Rep., 687;
Doolan vs. *Carr*, 125 U. S. Rep., 618.

The real plaintiffs in the case at bar are the grantees of the R. R. Co.; and in order to beget for *them* a standing in this suit, the Court below ruled that the State selections

under which defendants claimed, were void because the land was claimed under the Las Pocitas grant. (Rec. p. 58, fol. 111). But this very fact is conclusive of the R. R. Co's standing, to the effect that it acquired no right to the land in controversy; and that, even if it had a patent for this land, so held and claimed at the time the line of the road was definitely fixed, such a patent would be void.

Carr vs. *Doolan, supra;*
Kansas Pac. R. Co. vs. *Dunmeyer, supra;*
Sioux City, etc. vs. *Griffey*, 143 U. S. Rep., 38;
New Orleans, etc. Co. vs. *Parker*, 143 U. S. Rep., 57.

IV.

That portion of the decision of the lower Court which holds that lands cannot be selected, as State lien lands, before being surveyed by the U. S. is without application or point; because the land in controversy was surveyed in the field in March, 1865; and, the plat of the survey was filed in the proper U. S. Land Office on June 10, 1865; and, the application of the State locating agent was filed and received, and the land selected, and an entry to that effect made by the officers of the U. S. Land Office on their registry and tract books on June 12, 1865. and so selected in lieu of lands lost to the State. (Rec. p. 169). Thereupon, the State sold it to the grantor of defendants.

Therefore, in addition to the reservation of the land under the Mexican grant, *so far as the R. R. Co. is concerned*, the land was disposed of by the U. S. before it was known where the road would be located, and several years before the road was built or the line of the road definitely fixed.

The lower Court has stated that the *filing* of the plat of the U. S. survey of T. 2 S., R. 1 E., in the local U. S. Land

Office on June 10, 1865, is void; but no reason is given for this statement (Rec. p. 57, fol. 109) and we know of no reason that could have drawn forth this statement unless it be that the surveyed land was then held and claimed as a part of this Mexican grant, Las Pocitas. But that reason, if it is the one, deals death to the pretensions of the R. R. Co. as to its claim, that the title passed to it.

However, we are not concerned here in testing the rights of the defendants to the land in controversy as against any claim thereto on behalf of the U. S. for itself, or on behalf of any other party or claimant than the grantees of the R. R. Co. Consequently, the suit must be sustained, if at all, on the strength of the title of the grantees of the R. R. Co. and not on the weakness of the defendant's title. So, it is immaterial, at least as far as this suit is concerned, when the land was surveyed by the U. S., or when the plat of the survey was filed in the U. S. Land Office.

V.

The lower Court held also "that the filing of the map "of the general route and the withdrawal thereupon from "sale, pre-emption, etc., protected the lands against the "acquisition of any other right by any other parties until "the line should become definitely fixed." (Rec. p. 56, fol. 108).

This is giving to the filing of the *general* route map too much effect—an effect to which it is not entitled. In this behalf the Court said: "On January 30th at latest the "grant to the railroad company attached in such manner "that it could not be thereafter limited or divested." (Rec. p. 57, fol. 109).

There are two maps provided for by the acts, viz: the

general route map and the *definite* location map. Upon the filing of the general route map, under the provisions of the act of 1862, it became the duty of the Secretary of the Interior to cause the odd-numbered sections of public land to the extent of 15 miles on each side of such general route to be withdrawn from "pre-emption, private entry and sale," but not from selection by the State in lieu of lands lost to the State. A State selection of the kind involved in this suit is not a pre-emption, or a private entry or a sale. The meaning of these terms in the disposal of public lands is well known; and this distinction has already received consideration from this Court.

Kansas Pac R. Co. vs. *Dunmeyer, supra.*

The land in controversy was selected by the State, and the selection was entertained, registered and entered on the tract books by the Register of the U. S. Land Office, on June 12, 1865. (Rec. p. 169). Thereby, the land was disposed of as far as the R. R. Co. was concerned; and it was so disposed of some 4 or 5 years before the line of the road was definitely fixed. So that, even if the land had not been held or claimed under the Mexican grant, it was thus disposed of.

VI.

Mention is made by the lower Court of the preliminary or initiatory survey made by Mr. Lewis within the boundaries of the Las Pocitas grant, in May, 1854; but no consequence is given to it, and rightfully so. It was objected to when offered in evidence, and we submit that the objection is well taken. (Rec. pp. 120–1, fols. 223–4).

This Lewis survey, so called, was never mentioned or heard of for any purpose, or in any connection, from June,

1854, until about Nov. 1872, which was *after* the patent had been issued to the heirs of Livermore for the final survey of their grant. Then the defendants here can safely say that, this old initiatory survey was dug up by parties interested, one way at one time and another way at another time, to make use of it by consent or collusion to suit their respective designs; and in this way lengthy decisions were procured from officers of the Land Department under circumstances not disclosed by the record, but which have no binding effect upon the defendants, as neither they nor their grantors were parties to the proceedings. (Rec. pp. 216–244, fols. 386–438).

There is no legal or reliable evidence that Livermore or Noriega ever knew of the existence of this survey, much less that they ever abided by it for a moment. Mr. Lewis could not bind the grantees by observations which he might see fit to interject into his field notes. These observations are not the acts or expressions of Livermore or Noriega. This survey was never mentioned during the judicial investigation which the Mexican grant, Las Pocitas, underwent after June, 1854, or while being surveyed under the Department of the Interior, preparatory to the issuance of a patent; and it was but a part of the tract of land designated in the decree of confirmation, under and within which the grant was twice surveyed preparatory to the issuance of the patent. (Test. of Hopkins, Duerr, Kottinger and Martin, Rec. p. 83–117, Dyer survey of 1865, Ex. 57; also "Exhibit Hopkins.")

The lower Court says in its decision: "The lands were " claimed under the Las Pocitas grant at the time of their " selection (June 12, 1865), location and sale by the State, " (Dec. 9, 1870, Rec. p. 275), and they were afterwards

" included in one of the surveys upon the final decree of " confirmation, (the Dyer survey of 1865); but that survey " was set aside, and they were finally excluded by the sur- " vey which became final in the year 1871. The Supreme " Court held that no valid selection could be made by the " State until the grant was finally located." (Rec. p. 58, fol. 112).

One would suppose that this would be sufficient to quiet and forever suppress all pretensions that the land passed to the R. R. Co., in view of the numerous decisions of this Court and of the Supreme Court of California, some of which have already been cited.

VII.

While it is thus held by the lower Court that the land was claimed under the Mexican grant from 1839 to June 6, 1871, it is also held that no right of any kind had attached to it on January 30, 1865; and while it is said that the Supreme Court held that no valid selection could be made by the State until the grant was finally located, it is also said that under the recent decision of *U. S.* vs. *McLaughlin*, nothing could prevent the R. R. grant from attaching. (Rec p. 58, fols. 111-12).

These expressions seem to us quite inconsistent with each other. The burden of the decision is directed towards trying to point out the weakness of defendants' title; but the very grounds on which defendants' title is claimed to be weak, effects the certain overthrow of the R. R. Co.'s pretensions to a title, according to all the authorities.

The stand taken that under the case of *U. S.* vs. *McLaughlin* (127 U. S. Rep., 428), nothing could prevent the R.R. grant from attaching to lands so held and claimed as a part

of a valid Mexican grant is contrary to the very language of the Pac. R.R. Acts, and is contrary to the case itself, and is not maintainable. The idea on which this stand is taken is, that this Court has thereby overruled *Carr* vs. *Doolan*, 125 U. S. Rep., 618; and *Newhall* vs. *Sanger*, 95 U. S. Rep., 761; and *Leavenworth, &c.* vs. *R. Co.*, 92 U. S. Rep., 743, and many other cases in this Court, and a long line of cases decided by the Supreme Court of California, viz.: *McLaughlin* vs. *Powell*, 50 Cal., 64; *McLaughlin* vs. *Fowler*, 52 Cal., 203.; *Carr* vs. *Quigley*, 57 Cal., 394, and many other cases.

Apart from the fact that no such judicial slaughter has taken place, it would be most unfortunate to have reason to apprehend any deviation in the consistency of the rulings and decisions of this Court.

Newhall vs. *Sanger* and *U. S.* vs. *McLaughlin* pertained to lands affected by the same pretended Mexican grant, and are, to a great extent, linked together. The former was commented upon at some length in the latter, but was not overruled, nor even limited to any extent. It was merely explained. The former has been cited and approved very frequently by this Court, and has been followed many times by several of the State Courts, especially by the Supreme Court of California, and to interfere with the rule established by it would, indeed, be serious. There, a patent was issued by the U. S. to the West. Pac. R. Co. in 1870 for the land sued for as a part of the R.R. grant. Subsequently the U. S. issued another patent for the same land to one Dayton, and it recited that the land was within the exterior limits of a Mexican grant called Moquelamos, and that a patent had, by mistake, been issued to the R. R. Co. It is then assumed that the line of the road of the West. Pac. R. Co. was located (*definitely fixed*) *before* February 13,

1865, on which date the Moquelamos claim was finally rejected. The record was neither full nor explicit. Upon these facts the Court held, in substance, that lands held or claimed under a Spanish or Mexican grant at the time the line of the road was definitely fixed was reserved, and was not public land, within the meaning and provisions of the R. R. Act, and did not pass to the R. R. Co. A distinction was sought to be drawn by counsel for the R. R. Co.'s patent between lands so claimed under a valid grant and lands claimed under an invalid grant, or more properly speaking, between lands claimed under a grant and lands claimed under what was not a grant; and upon this distinction *only* two of the learned justices dissented from the majority of the Court.

In *U. S.* vs. *McLaughlin*, the lower Court found as facts that, the Moquelamos grant was finally rejected on Feby. 13, 1865; and that the line of the road of the Western Pac. R. Co. was not definitely fixed until after that time; and, that finding was not questioned by this Court. This was enough for a decision of the case in favor of the R. R. Co. All the rest said in the decision may be fairly considered *obiter dicta*. But, as this Moquelamos claim was not a grant at all, and as it never underwent any process towards its location, and was never surveyed, or the like, the Court proceeded to consider the location of the east boundary, that being mentioned in the pretended grant as "on the east upon the adjacent ridge of mountains"; and the Court concluded that this must be at what was called in the case the "Jack Tone road"; and that, with this as the east boundary, and the other three boundaries (north, south and west) which were considered sufficiently certain, there would be more than double enough land to satisfy the

claim of eleven leagues, even if the grant were valid. It is then said that there are three kinds of grants, viz: 1st, grants by specific boundaries, where the grantee is entitled to the entire tract within the given boundaries; 2d, grants of a certain quantity within outside boundaries embracing more than the quantity granted; and 3d, grants of a certain place or rancho by name, where the grantee is entitled to the whole place or rancho. It is said the 2d kind may be called a float; and that the Moquelamos was of that kind.

As we take it the only object the learned Justice who prepared the decision could have in thus considering the boundaries of this Moquelamos claim was to ascertain how much was reserved within the provisions of the R. R. Act, so as to give it the effect of a reservation, assuming that the pretended grant was not finally rejected when the line of the road was definitely fixed. The classification of grants is a correct one. The 1st and 3d kinds are grants of *all* lands within the given boundaries or constituting the place or rancho named, and are not merely reserved, but are granted lands, *i. e.*, all private property. But it is only where there is a given quantity, such as two, four, or any other number of, leagues granted within given boundaries containing a larger quantity, that the reservation of the whole is made until the lesser and granted quantity is finally located and set off by survey to the grantee. It is true, as said by the Court, that such a grant is "to be located by "the consent of the Government before it can attach to any "specific land. But, whether such a grant be called a float or a sobrante, or by any other name pleasing to the person who chooses and applies it, the grant attaches *generally* to the larger designated tract within which it is to be located, until by final location and survey it becomes

attached to the necessary specific quantity; and then the remainder or sobrante becomes released from reservation. And if this reservation pertains at the time the line of the railroad is definitely fixed, the R. R. Co. obtains no claim or title to the land.

The Moquelamos claim was not a grant at all or of any kind, but was what the Court called "a wretched fraud"; yet, the mere claim that it was a grant was sufficient to have it declared reserved from the R. R. grant to the extent of its boundaries, on the assumption that it was not finally rejected at the time the line of the road was definitely fixed.

The Las Pocitas grant was, however, a valid one, and its exterior boundaries are well-known and certain, and they completely surround the land in controversy, and the land is even far inside of the outside lines of the Dyer survey of 1865, made with a view toward having a patent issued therefor. The grantees contended, to the last opportunity, that the Las Pocitas was a grant of the entire tract, and not of any less amount, *i. e*, belonged to the first kind of grants above mentioned (Rec. p. 295, fol. 520). The validity of the grant was never questioned. The fact that less land than that contained within the outboundaries was finally set off and patented in satisfaction of the grant, and the legal effect of the claim under the grant to the excess which was finally rejected from the claim of the grant, have been frequently considered by this Court. See

Huff vs. *Doyle*, 93 U. S. Rep., 558;
Aurreacochea vs. *Bangs*, 114 U. S. Rep., 381;
Durand vs. *Martin*, 120 U. S. Rep., 369;
Doolan vs. *Carr*, 125 U. S. Rep., 618;

and other cases.

Until the less amount was finally located and the survey thereof finally approved on June 6, 1871, the entire tract remained in reservation; and the last case in which this was considered and so held by this Court is *Doolan* vs. *Carr* (125 U. S. Rep., 618, *supra*), in which it is said, "The "entire half section of land described in the complaint "herein is located and embraced within the boundaries "stated, and tract described in and confirmed by the said "decree of the Board of Land Commissioners of the U. S. "District Court and of the Supreme Court of the U. S., "but was not included within the tract so surveyed in "March, 1869, and finally approved on June 6th, A. D. "1871, as aforesaid, as the final survey of said Mexican "grant." And on this ground the Court held that the land did not pass to the R.R. Co.

It is submitted that the decree of the lower Court should be reversed, and the suit ordered dismissed with costs to the appellants.

MICH. MULLANY,

Counsel for Grantees of Defendants, Whitaker and Deardorff, and S. ½ S. 35, T. 2 S., R. 1 E.

149 US 662

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1892

No. 258.

HENRY CURTNER, J. WEST MARTIN, THE BANK OF CALIFORNIA, ALFRED E. WHITAKER, ET ALS.,

Appellants,

vs.

THE UNITED STATES.

Brief on Behalf of Appellants.

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Of Counsel for Appellants.

HENRY F. CRANE,
Solicitor for Appellants.

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IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1892.

No. 258.

HENRY CURTNER, J. WEST MARTIN, THE BANK OF CALIFORNIA, ALFRED E. WHITTAKER, ET AL.,
Appellants,

v.

THE UNITED STATES.

BRIEF ON BEHALF OF APPELLANTS.

Statement.

This is a Bill in Equity brought in the U. S. Circuit Court for the Ninth Circuit, District of California, by the United States of America against Henry Curtner and a number of others, all patentees of the State of California, for the purpose of having it decreed that certain listings of indemnity school lands situated in

that State in township 3 south, range 3 east, and 2 south, range 1 east, be set aside, recalled, canceled and annulled, and that said lands be deemed to be held subject to the railroad grant made for the purpose of aiding the construction of the Pacific railroad as provided in the U. S. Statutes of July 1, 1862, and July 2, 1864.

The original bill having been demurred to, it was amended, and to the amended bill another demurrer was interposed (pp. 21 and 22 of Transcript of Record), which demurrer was overruled.

The bill having been answered, putting in issue the material allegations of the bill and setting up as separate defenses the respective rights of defendants, depositions were taken and many exhibits filed, the result being a decree which not only gave the relief asked for by complainant, but which went beyond it by decreeing the nullity of the State patents, and by enjoining the defendants from asserting any title under them (pp. 46 and 47 of Transcript of Record).

The bill sets out with laborious detail the various transmogrifications and consolidations and assignments of the Central Pacific and Western Pacific which it is needless to go into, as no point is made upon any of them by appellants, and we shall use, throughout, the phrase railroad company as being useful and quite sufficient for the purpose.

The various acts of Congress under which the company claims the lands in controversy are set out in great detail, as also what it did under them, it being alleged that its map of general route was filed before the 30th day of January, 1865 (the real date being Dec. 28, 1864), and that on the 31st day of January, 1865, the Secretary of the Interior "caused the lands "within fifteen miles of said designated route to be

" withdrawn from pre-emption, private entry and sale" (page 6); that the road was built between the designated points "on or before the 29th day of December, " 1869," (pp. 7 and 13) and that on the first day of February, 1870, the company filed its map of definite location in the Department of the Interior (see Amendment to Amended Bill at page 39 of Transcript of Record); that the company had performed all the conditions imposed by the grants to it, and was entitled to have patents accordingly for the lands in controversy; that (and here follows the only allegation as to *mistake*—there being *no fraud* alleged) "the Com- " missioner of the General Land Office did, at the " various and respective dates hereinafter stated, *with-* " *out right and through error, inadvertence and mis-* " *take, wrongfully list by certified lists thereof to the* " *State of California*," the lands in controversy, the dates of the four lists and the land covered by each respectively being given; the dates ranging from September 8, 1870, to March 24, 1873; that on the 12th day of May, 1874, the railroad company, by its deputy land agent, presented to the Register and Receiver of the local land office its selections of lands claimed by it under its grant, and that the "Register and Receiver " wrongfully and in violation of their duty refused to " certify said list as aforesaid requested, and refused " to certify the same in any manner whatsoever," (pp. 14 and 15 of Transcript); "that the State of California " did, at various times subsequent to said eighth (8th) " day of September, A. D. 1870, by its land patents, " purport to convey said lands mentioned in said list " to divers and sundry persons other than 'the Wes- " tern Pacific Railroad Company,' or its successors, the " 'Central Pacific Railroad Company,' and against the

" will and without the consent of the said companies " or either of them, as follows, to wit:" Then follow the dates of patents, the lands patented, and the patentees respectively, the dates ranging from the 9th day of November, 1870, to the 18th day of May, 1872, but one patent having been issued since the latter date, and that was a patent dated March 4th, 1878, for the west half of section 15, T. 2 S., R. 1 E. (pp. 15 and 16 of Transcript); that the lands so patented by the State were on the first day of July, 1862, and on the 30th day of November, 1862, and on the 2nd day of July, 1864, and on the 5th day of October, 1864, and on the 30th day of January, 1865, and on the 29th day of December, 1869, alternate sections of the public lands of the United States, and were within the limits of the railroad grant, and had not been sold, or reserved, or otherwise disposed of by the United States, and that no pre-emption or homestead claim had attached thereto, at the time the line of the road was definitely fixed; that the President of the United States refused to issue patents to the railroad company for said lands, not "because it was " not the kind and description of land granted, but " solely because said land had previously been by " mistake wrongfully and inadvertently listed to the " State of California" (pp. 16 and 17 of Transcript); that defendants and their grantors at all the times mentioned in the bill, " had actual notice of the said " grant of said lands to said company, the said with- " drawal thereof, the said erroneous and unlawful list- " ing thereof by the said error, inadvertance and mis- " take of the said Commissioners, and of each and all " of the matters and things hereinabove set forth."

The bill then sets out the various ineffectual steps

taken by the railroad company to have the Department of the Interior cause patents to be issued to it notwithstanding the listment to the State (pp. 17 and 18 of Transcript); that the Register and Receiver of the land office at San Francisco "reported that in accordance "with the instructions of January 24th, 1878, they, "on February 25th, 1878, had made demand on the "State of California for the surrender of the certifica- "tion by the Commissioners of the State of Cali- "fornia" of the lands in controversy, and that no surrender had been made, and that on March 18th, 1879, "said Register and Receiver reported that in accord- "ance with the Commissioner's instructions of March "9th, 1878, they, on March 26th, 1878, furnished the "State Surveyor-General a copy of said letter of "instructions and made demand on the State of Cali- "fornia to surrender her title and listing of said lands, "but that up to that date (March 18, 1879,) she had "failed to surrender as requested" (p. 18 of Transcript); that demand was made by the United States of America on February 25, 1878, on the State of California that said State relinquish to the United States its title to said lands, and that said demand was refused; that thereupon, on the 12th day of July, 1881, the Secretary of the Interior requested the opinion of the Attorney-General of the United States as to "whether patents could then be issued for said "land or the certification to the State of California "must first be judicially vacated; and that afterwards, "on the 18th day of October, 1882, the Secretary of "the Interior addressed the Commissioner of the Gen- "eral Land Office, enclosing a copy of the Attorney- "General's opinion, and directed the papers to be pre- "pared for suit to set aside and annul the listing and

" certification of said lands to the State of California ;" and that thereafter the Secretary of the Interior requested the Attorney-General to commence suit in the proper court to set aside the listing (p. 19 of Transcript). The bill alleges that proceedings have been pending in the Land Department continuously for the purpose of having said erroneous listing corrected, and that the said proceedings were prosecuted with diligence. The bill further alleges that the defendants claim their right to the land under said listing and not otherwise (page 20 of Transcript). It is further alleged that the mistake in listing said lands " was not discov-" ered by complainants or its officers of the said land " department, or by said Central Pacific Railroad " Company or its grantees until the 12th day of May, " 1874, nor could the same by reasonable dili-" gence have been discovered sooner" (p. 15 of Transcript). It is further alleged in the bill that the railroad company " did, within three years of the completion of " said Central Pacific Railroad Company's road, sell " and dispose of said lands (the lands in controversy) " to persons other than defendants."

The following facts appear from the depositions and exhibits :

In March, 1865, township 2 south, range 1 east, was surveyed in the field, and on April 6, 1865, the field notes of the survey were approved by the U. S. Surveyor-General. A plat was constructed from these field notes and this plat was duly certified and filed in the office of the Surveyor-General. A duly certified copy of this plat was thereupon filed in the local land office on the 10th day of June, 1865; and on the 13th day of June, 1865, the State Locating Agent, on be-

half of the State of California and as part satisfaction of her school land grant, located and selected the land in controversy embraced in this township, and, in pursuance of such location and selection and as recognizing the validity of the same, the U. S. Register entered the location and selection in the tract book of his office. (Transcript, pp. 260 to 263, fol. 456, 457 and fol. 488, 489.) These State selections were duly reported to the General Land Office at Washington, and thereupon said office listed said lands to the State in lists 18 and 20, duly certified both by the Commissioner of the General Land Office and by the Secretary of the Interior on Sept. 8, 1870, and March 9, 1871 (pp. 168 to 172 of Transcript). These lists show the State selection, to have been made on June 13, 1865.

As to the lands embraced in these lists applications were made to purchase from the State, and certificates of purchase and patents were issued by the State, as follows:

Application, July 24, 1862, Thos. Murphy, E. $\frac{1}{2}$ of 21; certificate of purchase issued July 11, 1863; patented Feb. 3, 1871.

Application, July 22, 1862, Sam'l B. Martin, E. $\frac{1}{2}$ of 13; certificate of purchase issued March 2, 1863; patented Feb. 3, 1871.

Application, March 10, 1863, J. B. Purdy, W. $\frac{1}{2}$ of 15; certificate of purchase issued January 25, 1864; patented March 4, 1878.

Application, March 10, 1863, Marshall M. English, N. E. $\frac{1}{4}$ of 15; certificate of purchase issued January 25, 1864; patented Nov. 9, 1870; now in Henry Curtner, one of Appellants.

Application, March 12, 1863, A. J. Shrader, N. E. ¼ of 33; certificate of purchase issued July 1, 1869; patented Nov. 9, 1870.

Application, March 12, 1863, Sam'l Davis, W. ½ of 13; certificate of purchase issued March 31, 1870; patented Apl. 6, 1871,

Application, September 22, 1865, F. O. Wakeman, S. ½ of 35; certificate of purchase issued December 9, 1870; patented May 18, 1872.

Application, September 22, 1865, C. F. Goodrich, N. ½ of 35; certificate of purchase issued December 9, 1870; patented May 18, 1872.

(See agreed statement of facts as to this township at pages 260 to 264 of Transcript.)

In August, 1862, township 3 south, range 3 east, was surveyed in the field, and the field notes approved by the U. S. Surveyor-General. A plat was thereupon constructed from these field notes and certified to be correct and filed in the office of the U. S. Surveyor-General on December 24, 1862 (Complainant's Ex. W.), and a copy filed in the office of the Commissioner of the General Land Office (Respondent's Ex. 25). This plat was amended and a copy of the amended plat was filed in the local land office, Dec. 28, 1865. This amendment consisted of putting on the plat "lot 37" of the first Dyer survey of the Las Pocitas Rancho. A copy of another plat was filed in the local land office June 4th, 1869, this plat conforming to the original plat of 1862. That there must have been a copy of the original plat in the local land office before January, 1863, which has been lost, or so defaced by handling as to have become useless, is obvious from several considerations:

First—It is inconceivable that there should have been such dereliction of duty on the part of the U. S. Surveyor-General as that he should have neglected to file a copy of the plat of the survey for years after that survey had been made and platted, particularly as he had the original on file and of record in his office, and had sent on a copy to the Commissioner of the General Land Office. It must be presumed, in the absence of positive proof to the contrary, that he did his duty and filed the copy at about the time he filed the original in his own office.

Secondly—There is no law which requires the Register to keep a record of the times of filing plats, and the fact that a plat is found bearing a certain file mark is not proof that no other plat of the same township had not been previously filed, particularly when the action of the Register is consonant with such previous filing, as in the present case. Now, it appears from the tract book No. 10, that the Register entered State selections therein of the lands in controversy in this township in the years 1863 and 1864, and it may well be asked how he could properly do this unless the official copy of the township plat were in his office (p. 457 of Transcript).

Thirdly—It will be seen by the tabulated memoranda on each plat that the survey of 1862 is the basis of all the subsequent plats of this township.

From the foregoing we are authorized to assume, as a fact in the case, that a copy of the plat of the township was on file in the local land office at or about December 24, 1862.

On June 25, 1863, ~~December 10~~ May 22, 1863, and May 16, 1864, the State Locating Agent, on behalf of the State of California, and as part satisfaction of her

school land grant, located and selected the land in controversy embraced within this township, and in pursuance of such location and selection, and as recognizing the validity of the same, the United States Register entered such location and selection in the tract book of his office (Transcript fol. 456, 457). These State selections were duly reported to the General Land Office, and thereupon the lands were listed to the State in lists certified by both the Commissioner and Secretary of the Interior, the lists being numbered 23 and 25, and dated March 24, 1873, and Nov. 15. 1871.

As to the lands embraced in these lists, applications were made to purchase from the State, and certificates of purchase and patents were issued by the State, as follows:

Application, May 15, 1863, M. D. Townsend, NW$\frac{1}{4}$ of 21; certificate of State Locating Agent, June 25, 1863; location approved by Surveyor-General of State Dec. 10, 1863; certificate of purchase issued February 17, 1864; patented 29th Nov., 1871.

Same as to application of A. B. Winegar, as to SW$\frac{1}{4}$ of Sec. 21, except as to certificate of purchase, which was issued July 9, 1864.

Application, May 27, 1863, George W. Dam, NW$\frac{1}{4}$, W$\frac{1}{2}$ of the NE$\frac{1}{4}$, and NE$\frac{1}{4}$ of the NE$\frac{1}{4}$ of Sec. 19, embracing land described in complainant's bill as follows: NE$\frac{1}{4}$ of NE$\frac{1}{4}$, lot 4, SW$\frac{1}{4}$ of NE$\frac{1}{4}$, lots 5, 1 and 7 of Sec. 19; certificate of State Locating Agent, July 25, 1803, approval of State Surveyor-General Dec. 10, 1863; certificate of purchase issued February 22, 1864; patented April 5, 1873.

Application, April 20, 1864, M. B. French, S$\frac{1}{2}$ of SW$\frac{1}{4}$, and SW$\frac{1}{4}$ of SE$\frac{1}{4}$ of Section 17; SE$\frac{1}{4}$ of NE$\frac{1}{4}$ of Sec. 19; certificate of State Locating Agent, May

26, 1864; approval of location by State Surveyor-General, July 8, 1864; certificate of purchase issued February 9, 1866; patented Nov. 29, 1871.

(See agreed statement of facts on this township, at pages 245 to 247 of transcript.)

The purchasers from the State and their grantees entered into actual occupation of the lands in controversy under their certificates of purchase, and from that time on have continued to possess the same, cultivating and using their possessions for all appropriate purposes. Many of them had been in such occupation for more than five years before the map of definite location was filed (the period of limitations in California), and for twenty years before the bill in the present suit was filed, nor had any of them reason to believe that the railroad company claimed the land, for it was not until May, 1874, that the company filed its claim for it in the local land office; and this was several years after listment to the State and patent by the State to its vendees.

As to the claim of the railroad company, the facts are as follows:

Map of general route filed in General Land Office, Dec. 8, 1864.

Order of withdrawal on account of filing map of general route, January 30, 1865. This order of withdrawal does not follow the statute, but includes locations and homesteads which are not included in the statute. This latter limits the withdrawal to "*pre-emption, private entry* and *sale*," each of which words has, and has had for many years, a well defined meaning (*K. P. R. R. Co. vs Dunmeyer*, 113 U. S., 634); while the order of the Secretary covers in terms "sale,

location, pre-emption and *homestead*." He leaves out "private entry," and puts in "*location*" and "*homestead*."

Map of definite location filed February 1, 1870, in General Land Office.

Selections of railroad company through Land Agent Torbert, dated May 12, 1874. (pp. 177–178 of Transcript.)

The main line of road between Sacramento and San Francisco covered by grant was first surveyed in 1868 by C. P. R. R. Co. and by it built and completed in 1869. (See Ex. 56.)

The line of road from Vallejo's Mills, or point marked Flagg Staff 1 to point marked Flagg Staff 11, at or near Sacramento, which lies within the limits of the railroad grant, was not surveyed or marked on the ground until the year 1868. (See Def. Ex. 56.)

As to the Las Pocitas grant, the facts are as follows:

The grant was confirmed by Land Commissioners February 14, 1854 (p. 283) for two leagues, and was confirmed on appeal from the decision of the Commissioners by the United States District Court, and the boundaries of the grant specifically determined, the decree of the Court, being dated February 28, 1859. (fol. 506–507 of Transcript.)

This decree was confirmed by the Supreme Court of the United States Feb'y 6, 1861, the opinion of the Court specifically setting out the boundaries of the grant (See Decree at folios 508 to 510 of Transcript).

The Lewis survey was made in May, 1854. This survey was merely preliminary. (Folio 363 to 365 of Transcript.) It excludes all the land in controversy,

and was made under direction (as to natural objects) of Livermore, one of the grantees.

The first Dyer survey was made Oct., 1865, for the purpose of locating the land described in the decree of the United States District Court. (See directions for it at folios 513–514 of Transcript.) It takes in all land in controversy, and embraced about ten leagues. This survey was rejected by the Secretary of Interior on the 30th of July, 1868.

The second Dyer survey was made in March, 1869, approved by U. S. Surveyor General May 11th, 1870, appproved by Commissioner of the General Land Office March 1, 1871 (p. 303 of Transcript), and patent issued in accordance therewith in May, 1872. It embraces two square leagues, and is inside the exterior limits of the Lewis survey. It excludes all the lands in controversy.

The Court has dealt so frequently with the statutes here involved that it is quite familiar with their various provisions; but, as matter of convenience in presentation, we have thought it well to append to this Brief such provisions of those statutes as are necessary to an understanding of the case, italicizing here and there where we may think it appropriate.

Errors Assigned.

The decree is erroneous in the following particulars:

1. The bill of complaint is without equity.

2. The bill did not warrant the relief prayed for or any relief whatsoever.

3. The bill did not warrant the relief granted by the decree.

4. It was apparent on the face of the bill that the complainant had no interest in the subject matter of the suit, and no proper title or right to institute a suit concerning it.

5. It appeared on the face of the bill that there was a plain, speedy and adequate remedy at law.

6. It appeared on the face of the bill that the alleged claim sought to be protected was stale and was barred by limitations.

7. It appeared on the face of the bill that the State of California was a necessary party defendant, and no reason is assigned in the bill why she was not made such party.

8. It appeared on the face of the bill that no demand and notice had ever been made on defendants.

9. The Court erred in overruling demurrer to the amended bill.

10. The Court erred in holding and ruling that the claim of the railroad company was superior to that of the defendants.

11. The Court erred in holding and ruling that no right other than that of the railroad company could be acquired or initiated in any of the land in controversy after the filing in the local land office of the district on January 30, 1865, of the order of withdrawal provided for in Section 7 of the Act of July 1st, 1862.

12. The Court erred in holding and ruling that said order of withdrawal covered selections made by the State of California under grants to her by the United States.

13. The Court erred in holding and ruling that the filing of the map of its general route by the railroad company protected the lands in controversy from selection by the State of California.

14. The Court erred in holding and ruling that the filing of said map of general route initiated such right by the railroad company to the lands in controversy, as that thereafter no right could be initiated or acquired by the State of California under any of her grants from the United States.

15. The Court erred in holding and ruling that the right of the railroad company to the land in controversy was to be determined as of the time of the filing of said map of general route instead of as of the time of the filing of its map of definite location.

16. The Court erred in holding and ruling that lands are not surveyed by authority of the United States until a certified copy of the official plat of survey has been filed in the local land office.

17. The Court erred in holding and ruling that township 3 south, range 3 east, was not surveyed by authority of the United States before the filing of said map of general route.

18. The Court erred in holding and ruling that no copy of the plat of township 3 south, range 3 east, was lodged in the local land office before the selections made by the State of California in that township.

19. The Court erred in holding and ruling that the State selections of the lands in controversy were made upon unsurveyed land.

20. The Court erred in holding and ruling that the State selections of the lands in controversy were of lands excepted from such selection by the United States under which such selections were made.

21. The Court erred in holding and ruling that the railroad grant was the first grant to attach to the lands in controversy.

22. The Court erred in holding and ruling that the Act of 1866, entitled, "An Act to quiet land titles in California," did not confirm and make valid said State selections.

25. The Court erred in holding and ruling that the parties purchasing from the State the lands in controversy embraced in township 2 south, range 1 east, had notice of the claim of the railroad company.

24. The Court erred in holding and ruling that the cause of action attempted to be set out in the bill of complaint was not barred by limitations.

25. The Court erred in holding and ruling that the Government of the United States had such beneficial interest in the subject-matter of the controversy as would authorize it to file the bill of complaint.

26. The Court erred in holding and ruling that the land within the exterior boundaries of the Las Pocitas grant (so long as enough was left to satisfy the two leagues covered by said grant) was public land which could enure to the railroad company, but was not public land which could enure to the State of California.

27. The Court erred in considering any evidence in said bill of complaint which dealt with anything except the listing of the lands to the State, and erred in considering such evidence as dealt with the selections by the State or the manner in which said selections had been made, there being no allegations in said bill to warrant consideration of such evidence.

28. The Court erred in considering the opinions of the Secretary of the Interior and the Commissioner of the General Land Office in regard to said State selections and the right of the railroad company to the lands covered by them, for that the said officers had

no jurisdiction to determine said matters, the lands having been granted and listed to the State, and the defendants to whom the State had patented the lands not having been made parties to, or had notice of, the proceedings.

29. The Court erred in holding and ruling that the proceedings for the location of the Las Pocitas grant did not operate to reserve the land in controversy from the grant to the railroad company.

30. The Court erred in holding and ruling that the land in controversy was not excepted from the grant to the railroad company.

On the Demurrer.

I.

The United States had no such interest in the subject-matter of the controversy as warranted their filing the Bill.

It is averred that the United States had granted the land to the railroad company, that the railroad company was entitled to a patent, but that the land had already been listed to the State, and that upon that ground the United States had refused a patent to the company, and that the suit was brought to enable the Government to issue the necessary patent.

The response to this objection on demurrer, made by the learned Judge of the Circuit Court, is as follows:

"Besides we do not think the Government is wholly without interest. If these lands are within the statutory grant the company has earned them by a full performance of *its* part of the statutory contract, and an absolute, indefeasible right to a patent unencumbered by any cloud has vested. The Government in that case is legally bound to make a good title. It is legally liable to perform its part of the contract and issue the patent as required by the statute. The United

States, are, therefore, responsible to the railroad company for the land or its full value. By the mistake of their officers they have put it out of their power to comply with their contract and they are interested to the full value of the land in setting aside the listing and patents resulting from their mistake, or having them judicially adjudged inoperative and void in order that they may relieve themselves from their liability. For these reasons we do not think the decision relied on reaches the case." (Opinion at page 55 of Transcript.)

Now, we respectfully submit that the obligations of the Government to the railroad company, or its legal or moral responsibility to give it title to this land, cuts no figure in the case whatsoever.

It is alleged in the bill (p. 4 of Transcript) "that "said the 'Western Pacific Railroad Company,' and "its successor the 'Central Pacific Railroad Company,' "did, within three years of the completion of said "Central Pacific Company's road, sell and dispose of "lands hereinafter described and set forth to persons "other than defendants." The road is averred in the bill to have been completed December 29th, 1869. (Transcript, page 13.) The original bill was filed July 23rd, 1883. The sale of the land by the railroad company to "persons other than defendants" must therefore have been made before January, 1873, or nine and a half years before the amended bill was filed. The railroad company has sold the land, got its money, and the United States are under no obligation to it whatsoever.

It is evident from the opinion, that the Court was attempting to following the rule laid down in *U. S.* v. *Beebe*, 127 U. S., 338, but there is a qualifying clause in that case which at once distinguishes it from the one under consideration:

"But if it should come to the knowledge of the "government that a patent had been fraudulently

" obtained, and that such patent if allowed to stand " would work prejudice to the interests or rights of " the United States, or would prevent the govern- " ment from fulfilling an obligation incurred by it, " either to the public or to an individual, which per- " sonal litigation could not remedy, there would be an " occasion which would make it a duty of the govern- " ment to institute judicial proceedings to vacate the " patents."

The clause, "*which personal litigation could not* " *remedy*," is the very one upon which the Court took jurisdiction in *U. S.* v. *Beebe*, and this must necessarily be so, for there can be no warrant for the government to intervene on behalf of a party who is abundantly able to help himself. In the case at bar the grantees of the railroad company, after the sale by it to them, and the railroad company before the sale, could at any time have brought suit in their own name for the recovery of these lands, or for the quieting of their title.

The grant to the railroad company was one *in præsenti;* it passed the title at once, the subsequent survey being but a matter of identification, and the patent but in the nature of a deed of further assurance, and a more direct and convenient method of proving a title already vested. (See *St. Paul & P. R. Co. et al* vs. *Northern Pacific R. R. Co.*, Sup. Ct. Rep., March 2, 1891, and cases there cited, and particularly *Deseret* vs. *Tarpey*, 142 U. S., 241.) And indeed, this seems to have been the view of the Circuit Court, for in its decree we have the following language: " It is further ad- " judged and decreed that the title to said lands and " every part and parcel thereof had prior to the afore- " said listings and certifications, and prior to the issu- " ance of said patents or any of them, passed to and

" vested in the Central Pacific Railroad Company, " under and by virtue of the act of Congress," etc. (p. 47 of Transcript.)

The character of the mistake complained of is not alleged in the bill. The Court finds, as a fact without the pleadings, that the lands were selected by the State before survey, and as a matter of law, that "State " selection of lieu lands unsurveyed by the United " States are utterly void." (Syllabus of opinion 49, par. 5 of Transcript.) If, as the Court found, the listings to the State and the patents from the State to defendants were all void, the railroad company could have collaterally attacked them under the rule of *Doolan* vs. *Carr*, 125 U. S., 618, *Smelting Co.* vs. *Kemp*, 104 U. S., 641, and many other cases. Indeed, the company, connecting itself with, and claiming under, the paramount and common source of title, had the field clear for assault upon the State title under any statement of the rule of collateral attack on patent.

As to the circumstances which will authorize the Attorney General of the United States to institute suit to vacate a patent emanating from the government, we have this Court, through Mr. Justice MILLER, stating the rule in *U. S.* vs. *San Jacinto Tin Co.*, 125 U. S. 285., as follows :

" But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the

instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

"In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence, and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail In the case before us the bill itself leaves a fair implication that if this patent is set aside the title to the property will revert to the United States, together with the beneficial interests in it."

We submit that the case at bar cannot stand under the rule as thus formulated.

But above and beyond all this, the claim set up by the Court in behalf of the railroad company against the United States was barred by limitations at the time of the filing of the bill. The last list was made April, 1873; the bill was filed July 23, 1883—more than ten years after the cause of action accrued. By section 1069 of the Revised Statutes every claim is barred unless presented to the Court within six years after it accrues; and by section 1059, if the claim be what the Court asserts it to be, the Court of Claims had ample jurisdiction over it.

II.

There is defect of parties complainant in that the grantees of the Railroad Company are not joined with complainant in the prosecution of the suit.

The bill shows that the actual parties in interest are certain unnamed grantees of the railroad company, the averment being that the title has passed from the United States to the company by a grant *in præsenti*, and from the company to certain persons other than defendants (p. 4 of Transcript).

Story says in his Equity Pleading (section 72) that "It is the constant aim of Courts of Equity to do com-"plete justice, by deciding upon and settling the rights "of all persons interested in the subject matter of the "suit, so that the performance of the decree of the "Court may be perfectly safe to those who are com-"pelled to obey it, and also that future litigation may "be prevented."

The fact that the United States have the right of suit does not excuse the non-joinder of these parties in interest as plaintiffs. "Sometimes it happens that the re-"lator has an interest in the matter in dispute in con-"nection with the crown or government of the injury "to which he has the right to complain. In such a "case his personal complaint is joined to and incorpo-"rated with the information given to the Court by the "officer of the crown or government, and they form "together an information and bill, and are so termed." (Story on Equity Pleading, sec. 87.)

Unless these grantees of the railroad company are made parties, there may be no sufficient protection to the defendants by final decision in their favor. Should the decree be reversed and the bill dismissed,

the grantees of the company could, and in all probability would, at once bring an action in their own name; and the estoppel by judgment could not be pleaded against them, they not having been parties to the suit. At all events they would be put to the risk of establishing by parole that the grantees were the real parties in interest, and had promoted the suit.

III.

The Bill is multifarious.

The alleged wrongful Listings to the State are set out on pages 13 and 14 of the Transcript, and consist of four separate Listings, differing in date, and covering eighteen separate and distinct pieces of land.

The Patents from the State of California, sought to be set aside, are eighteen in number, to eighteen separate and distinct tracts of land, to as many different persons, and of eight different dates, from November 9th, 1870, to March 4th, 1878.

The same facts are not pleaded as to these separate Listings and separate Patents of the State. No facts are pleaded in the bill except merely that a mistake was made through "error and inadvertence," there being no averment that the mistake complained of was the same mistake in each of the separate Listings.

IV.

The Bill sets out a claim which is barred by laches and limitations.

On this we have the Circuit Court speaking in its opinion as follows:

"Since the decision on the demurrer the Supreme "Court has decided the case of *United States* v. *Beebe* "(127 U. S. 338 and 8 Sup. Ct. Rep., 1086) in which "it is held that after a lapse of forty-five years a suit

"in the name of the United States to cancel a patent "obtained by fraud and in which the United States "has no interest, is barred, the suit being affected by "the laches of those whose interests it asserts. The "point is, therefore, now again made at the hearing, "and this case is relied on as determining the question. "We do not think it reaches the case. There has cer- "tainly been no laches here on the part of the company. "It has earnestly been pressing its claim before the De- "partment from the first, and it could go no faster than "the business and course of procedure of the Depart- "ment permitted. The company could not sue the "government. Besides, we do not think the govern- "ment is wholly without interest," and then follow the views of the Court as quoted under the first point above.

A determined effort upon the part of the railroad company to obtain a patent that it was bound to know the Land Department was without jurisdiction to issue, is certainly a novel method of evading the statute of limitations. We do not see why the company could not have sued the government in the Court of Claims, if, as the Court says in its opinion, the "United States "are responsible to the railroad company for the "land or its full value" (p. 55 of Transcript); but be this as it may, it is beyond question that the company, or its grantees, could have sued the defendants; and it is no answer to the charge of laches, to say that it has been pursuing futilities in the Land Department, at the same time rejecting remedies which were at hand and easily available. That a Court of Equity will look through the nominal to the real party in interest is the settled doctrine. (*New Hampshire* vs. *Louisiana*, 108 U. S., 76.) And the case of

U. S. vs. *Beebe*, 127 U. S., 338, very specifically holds that in all cases where the United States are a party plaintiff, suing in the interest of private parties and for the purpose of enabling the United States to perfect the title of such private parties, the privilege of the United States as a government does not apply, and that any defense, including the Statute of Limitations, that could be pleaded against the actual party in interest, can be pleaded in such an action. The language of the Court is as follows, the italics being ours :

" We are of the opinion that when the government is a mere for-
" mal complainant in a suit, not for the purpose of asserting any public
" right or protecting any public interest, title or property; but merely
" to form a conduit through whom one private person can conduct
" litigation against another private person, a Court of Equity will not
" be restrained from administering the equities existing between the
" real parties by any exemption of the government designated for the
" protection of the rights of the United States alone. The mere use
" of its name in a suit for the benefit of a private suitor cannot extend
" its immunity as a sovereign government to said private suitor,
" whereby he can avoid and escape the scrutiny of a Court of Equity,
" into the matters pleaded against him by the other party; *nor stop*
" *the Court from examining into and deciding the case according to the*
" *principles governing Courts of Equity in like cases between private liti-*
" *gants.*"

Staleness of claim is a plea first recognized by Courts of Equity as a defense, but is only applied in cases where the statute is wanting or is silent. In cases where there exists a statute of limitations, but the statute is silent upon such a case as is presented to the Court, the Court by analogy will follow the statute as to the time necessary to render the claim stale. Where there is a statute upon the subject, the statute governs as completely as the plea of staleness, and can be treated in all cases where that plea could have been raised, with this advantage, that the time is certain.

In *U. S.* v. *Beebe*, the defendants pleaded both the statute and staleness of the claim, under the theory that if the statute did not apply to such cases, there was in fact an absence of statute upon the subject; that staleness of the claim was an equitable principle applicable to suits brought by the government in the same manner as any other rule in equity; and that the government when a suitor in equity must have complied with all the requirements of equity courts in such cases, or, as a private suitor, be left to its common law remedy. This view of the question is not sustained by the Court, but the statute and staleness of claim are placed upon the same footing, and it was therefore held that neither the statute nor laches, however gross, run against the government, and then come the distinguishing words: "But this case stands upon a different "footing and presents a different question. The ques- "tion is, are these defenses available to the defendant "in a case where the government, *although a nominal* "*complainant party, has no real interest in the litiga-* "*tion, but has allowed its name to be used therein for* "*the sole benefit of a private person?*" This question, plainly put, is the one answered by the ruling of the Court set out above; and the intimation that the great lapse of time, forty-five years, was the essential feature of the decision, as would appear from the opinion of the Circuit Court, is, we submit, disingenuous and misleading. On the contrary, this Court squarely applied the Statute of Limitations as against the *real party* in interest in the suit.

V.

The Bill is fatally defective in that the alleged mistake is not properly pleaded.

The pleading is as follows:

"That the Commissioner of the General Land Office "did, at the various times and respective dates herein-"after stated, without right and through error, inad-"vertence and mistake, wrongfully list by certified "lists thereof to the State of Calfornia, the above-"described lands."

As we have seen, the bill sets out with great detail all the performances of the railroad company by way of earning the land, and avers in effect that it was legally and equitably entitled to it; but why it was, that with the land covered specifically by its grant, the Land Department conveyed the land nevertheless to the State of California, nowhere appears on the face of the bill; there is no explanation whatever on the subject; and as the presumption must be indulged, as against the pleader, that the Commissioner of the General Land Office and the Secretary of the Interior both did their duty in the matter, we are bound to presume that if the explanation had been pleaded it would have shown that the listing was rightful instead of "wrongful."

It is a cardinal principle of equity pleading that the charging part of the bill must be certain and precise, and particularly is this so, so far as bills are concerned which are framed to obtain relief on the ground of fraud or mistake. As to the latter, the particular mistake relied on must not only be set out, but the manner in which it occurred; and all the circumstances surrounding the occurrence must be set

out with such precise detail as that the defendant may see with the utmost clearness what the ground is upon which relief is sought. The language of the bill is general to a degree; there is no detail of any kind showing how the alleged mistake occurred, or under what circumstances it occurred. Where the bill (complaint) was much fuller and far more precise than the one under discussion, the Supreme Court of California held it insufficient, and said: "It is well settled that a "complaint claiming relief on the ground of mistake "must not only distinctly aver the fact of the mistake "but also set forth the circumstances under which it "occurred in so far as those circumstances may be "necessary to present a case within the rule of equity "upon which relief is granted." (*Wright* v. *Shafter* 48 Cal., 276.)

In United States v. *Atherton*, 102 U. S. at page 374, Mr. Justice MILLER, speaking for the Court, says:

"Such a bill must rest, however, on the ground of "fraud or mistake, and it is too clear for argument that it "should set out the particulars of the fraud, or the "manner in which the mistake occurred.

"No copy of the patent is exhibited, nor of the "survey with which it is said to differ.

"There is only the general allegation that certain "persons, not named therein, conspired together, and "by false and fraudulent representations and suppres-"sion of facts imposed upon the officers connected "with the Land Office at Washington, and fraudu-"lently procured the patent to be issued.

"No names of the parties who committed the fraud, "no names of the persons or designations of the offi-"cers imposed on, are given. It is at war with the

" whole character of proceedings in courts of equity " to call in aid its extraordinary power to set aside on " these allegations such a solemn public record as a " patent of the United States."

The reason of the rule is, that matters of fact must be pleaded, so that defendants can join issue by denial. Whether a mistake has been made, that is, a legal or equitable mistake that courts will grant relief against, is a matter of law upon which a Court can give an opinion only when the facts and circumstances constituting the mistake are before it. The Commissioner of the General Land Office and the Secretary of the Interior, in dealing with land cases which come before them, act in a judicial capacity. There are many questions of law and of fact presented to them for determination, and it would be strange if a mistake, in the ordinary meaning of the word, were not made in some instances. If a mistake of law be made by them, that can be enquired into by the Courts when the title is in controversy in a litigated case; but any mistake of fact is irretrievable, their judgment on a question of fact being conclusive, for the rule is inexorable that when a tribunal is deputed by the legislative authority to determine any question of *fact*, its determination of that question is beyond review by any other tribunal, except in the matter of jurisdiction. (*French* v. *Fyan*, 93 U. S , 169.) It is plain, however, that the pleader does not, in the case at bar, rely upon any mistake of fact, but upon one of law; and that being so, it was imperative that all the facts should be set out, so that it might be seen whether or not a mistake of law could be held to arise out of such a state of facts.

By no method short of mind reading or inspiration, could the defendants, or the Court, have determined

from the language of the bill that the objection to be urged was not based upon any mistake of the Commissioner of the General Land Office or of the Secretary of the Interior with regard to the *act of listing*, but that the *selection of the land by the State* constituted the real ground of objection. The Court finds as a fact, not that the *listing* was made by mistake, but that the *selection* was made erroneously and wrongfully, and then as a matter of law concludes that the listing is void, as being based on a void selection. The *selection* of this land by the State is nowhere taken exception to in the bill. Even the fact that the State made selections of the land is not mentioned, and yet the Court upon the allegation of wrongful *listing* finds wrongful *selection*. As a matter of law, it may follow in some cases that a wrongful selection will have the effect to avoid the subsequent listing; but the averment of wrongful listing conveys no information whatever that it is the intention of the pleader to show a wrongful selection.

VI.

It would appear that the State of California was a necessary party to the Bill; but she was not made such party, nor is there any reason given why she was not.

It is one of the rules of equity pleading that all persons are necessary parties to a suit whose interests are affected by it. The indemnity school lands granted to the State were so granted in place of sixteenth and thirty-sixth sections lost to her, and the listings were made accordingly. She was regularly debited with all selections made by her, and it so appears in the bill:

"That thereupon the State of California was charged "by the United States, and the United States, com-

"plainant here, received a credit of so much land in "part satisfaction of said congressional grant of March "3rd, A. D. 1853." (p. 30 Transcript, bottom paragraph.) There is but one theory upon which the omission of the State can be based, and that is, that counsel for complainant were of the opinion that the State could not be sued. Granting for the moment this to be true, and further granting that the State is merely a proper and not an indispensable party, the bill is defective. After discussion of the rule that all persons interested in the subject matter of the action should be made parties, STORY says:

"The first exception to the rule which we should "notice is founded upon the utter impracticability of "making the new proper or necessary parties. This "occurs, of course, when such new parties are without "the jurisdiction of the Court, and when, consequently "they cannot be reached by process of Court. In "such a case to require such persons to be made par-"ties, would be equivalent to a dismissal of the suit, "and amount to a denial of justice. Hence it is a "common rule of Court, that when a person who ought "to be a party is out of the jurisdiction of the Court, "*if the fact is stated in the bill* [italics ours] and ad-"mitted by the answer or proved (*if denied*) at the "hearing, that of itself constitutes a sufficient ground "for dispensing with his being made a party, and the "Court will proceed to a decree without him." (*Story's Equity Pleading*, Section 78, and cases there quoted.) "Where the party is out of the jurisdiction, "that fact should be positively averred in the bill, and "not left to mere inference;" and again, we have STORY saying: "It is usual (as has been stated) to add in "the bill the name of the person out of the jurisdiction

"of the Court, so far as may be necessary to connect "his case with that of the other parties. But in such "a case the bill should not merely allege that the per- "son is out of the jurisdiction, but it should go on to "pray process against him, so that he may be made "amenable to the process of the Court, if he should "come within its jurisdiction."

The bill does not make the State a party; does not allege that the State is without the jurisdiction of the Court; does not pray process against her, nor does it allege that she has refused to appear in this action. It cannot be said that the State is without the jurisdiction of the Court until she has been made a party to this action and service upon her proper officer had; *non constat* that she will not appear and defend. The lack of jurisdiction, if it exists at all, is owing to a privilege of the State which may be waived, and it cannot be said that the State will not waive such privilege without opportunity given her to do so.

The absence of the State from the suit goes to other and further rights of defendants here than the title attacked in the bill. The State is certainly under as much obligation to those who bought the land from her as are the United States to a railroad company who claim under a government subsidy; and the learned Judge of the Circuit Court lays down the measure of damages to be the land or its full value. Were the State a party, then by cross bill these defendants could have had the equities as between themselves and the State settled and determined. For when the State waives its privilege and the Court acquires jurisdiction, it is acquired for all the purposes of the suit. (*Louisiana* v. *Jumel*, 107 U. S.). And on this account the right to file a cross bill is not confined to cases

between private persons; for if a foreign sovereign brings a bill the defendants may file a cross bill against him for a discovery of matters material to his defense." (*Story's Equity Pleading*, Sec. 390, and cases there cited.)

But the State of California is more than a proper or necessary party, she is an indispensable party. No decree can be made that will not affect her interest, nor can the rights of the defendants be fully adjudicated without her presence.

"It is an important qualification engrafted on this "particular exception, that persons who are out of the "jurisdiction and are ordinarily proper and necessary "parties, can be dispensed with only when their inter- "ests will not be prejudiced by the decree, and when "they are not indispensable to the just determination "of the merits of the case before the Court. The "doctrine ordinarily laid down on this point is, that "when the persons who are out of the jurisdiction are "merely passive objects of the judgment of the Court, "or their rights are merely incidental to those of the "parties before the Court, then inasmuch as a com- "plete decree may be made without them, they may "be dispensed with." (*Story's Equity Pleading*, Sec. "81 and note.)

And in Sec. 136 we have the learned author saying:

"It has been said that persons are necessary parties "where no decree can be made respecting the subject- "matter of litigation until they are before the Court "either as plaintiffs or defendants; or when the *de-* "*fendants already before the Court have such an in-* "*terest in having them made parties as to authorize*

"*those defendants to object to proceed without such* "*parties.*"

Nor is this rule changed by law or by rule of Court, for "neither the Acts of 1839 nor the 47th rule en- "ables the Circuit Court to make a decree when the "rights of an absent party must necessarily be affected "thereby." (*Coiron et al.* v. *Millandon et al.*, 19 How., 115.)

The fact that non jurisdiction is placed upon the ground of the State's immunity from suit does not alter the rule. "In those cases where it is clearly "seen upon the record that the State is an indispensa- "ble party to enable the Court according to the rules "which govern its procedure to grant the relief sought, "it will refuse to take jurisdiction." (*Cunningham* v. *Railroad Co.*, 109 U. S., 446; *Elliot* v. *Wiltz*, 107 U. S., 711.)

The State is a necessary party, for the allegations of the bill are directed to a title derived by the State from complainant, which cannot be set aside except the decree runs against the State, as the decree does in fact run.

The omission of the State from the suit becomes inexplicable upon further examination of the bill and the record. The whole case seems to have been most carefully made for the very purpose of suit against the State, and then the purpose of the bill is abandoned and another substituted. *Notice and demand, which are conditions precedent to suit founded upon mistake, are nowhere alleged to have been made upon defendants, but it is alleged most particularly to have been made upon the* STATE OF CALIFORNIA, *as follows:* "Your orator further shows that on the 25th day of "February, A. D. 1878, as stated aforesaid, demand

" was made upon the State of California by the Uni-
" ted States of America that the State of California
" relinquish to the United States of America its title
" to said lands, and that said demand was refused,
" and has not been complied with at the commence-
" ment of this action, etc." (Bill, p. 19 of Transcript.) And the request of the Secretary of the Interior that the Attorney-General institute suit, *is a request of suit against the State of California.* " I have the honor
" to request that you will, if in your judgment the
" facts warrant such a course, cause legal proceedings
" to be instituted in the proper court to *set aside the title of the State of California* to the lands described
" in the papers herewith." (Transcript, p. 315.) And the direction of the Attorney General—the sole authority for the bringing of the suit, and without which the suit must fail (*U. S. v. Throckmorton*, 93 U. S., 70)—follows the request made, and directs suit against the State. It is addressed to the District Attorney, and the authorization is as follows: " I hereby direct you
" to prepare and file pleadings in the Circuit Court of
" the United States for the District of California, the
" purport of which shall be to *extinguish the title of the State of California* to the said lands and the titles
" derived from the State." (Transcript, p. 315.)

The suit is irregular and of no avail, if for no other reason, that the suit actually brought is another and different action from the one directed to be brought by the Attorney General, and for which there is not legal authority; and the Attorney General makes the direction stronger than the request, inasmuch as he separates the title of the State from that of defendants here, and makes defendants secondary, though necessary, parties to the main action against the State. And yet, with

the State not brought into the suit, we have it decreed as follows:

"It is adjudged and decreed that the Listings by "the officers of the United States Land Department "to the State of California of the lands mentioned in "the amended bill of complaint and hereafter particu- "larly described, and all such listings and certifications "were and each of them was made through error and "mistake, and without authority of law, and that the "same are, and each of them is, adjudged and decreed "to be null and void; and it is further decreed that no "interest or title in said lands thereby passed to the "State of California."

"And it is further adjudged and decreed that the "several patents issued by the State of California upon "and in pursuance of the aforesaid listings and certifi- "cations of said lands to the State of California * * "respectively mentioned in the amended bill of com- "plaint, so far as the same embrace or purport to convey "the lands hereinafter described or any part thereof, "is null and void."

The case at bar is plainly distinguished from the case of *Williams* v. *U. S.*, 138 U. S., 514. In that case the bill alleged fraud upon the part of the grantees of the State, and that through such fraud the United States were led to part with their title to the State; and it is plainly evident that it was upon this point alone that the opinion was based, that the State need not be joined.

At pages 516 and 517 of the opinion, Mr. Justice BREWER says: "The State of Nevada might have "intervened. It did not; doubtless, because it felt it "had no real interest. It was no intentional party to "any wrong upon the general government."

On the Whole Case.

I.

The statute of July 1, 1862, covering the railroad grant here in question, by its third section grants "every alternate section of public land, designated by "odd numbers to the amount of five alternate sections "per mile on each side of said railroad, on the line "thereof and within the limits of ten miles on each "side of said road, *not sold, reserved, or otherwise dis-"posed of by the United States*, and to which a pre-"emption or homestead claim may not have attached "*at the time the line of said road is definitely fixed;*" and by the seventh section of the Act it is provided, "That within two years after the passage of this Act "said company shall designate the general route of "said road, as near as may be, *and shall file a map of "the same in the Department of the Interior*, where-"upon the Secretary of the Interior shall cause the "lands within fifteen miles of said designated route or "routes to be withdrawn from *pre-emption, private "entry and sale.*"

The Act of July 2, 1864, by section 4, increased the limit of the grant, and by section 5 enlarged the time by one year for designating the general route of the road and filing the map thereof.

The first question to be determined is as to the effect of filing the map of general route and the order of withdrawal of the Secretary. The Court below held that they had the effect of protecting the lands against the acquisition of any other right by any one else until the line should be "definitely fixed," when the grant became specific by attaching itself to every odd section within the prescribed limits.

This Court has, however, decided just to the contrary.

In *M. K. & T. Railway Co.* v. *Kansas Pacific Railway Company*, 97 U. S., 491, Justice FIELD in treating of the railroad grants under review, says: "When the location was made and the sections granted "ascertained, the title of the plaintiff took effect by "relation as of the date of the act, *except as to the res-* "*ervations mentioned;* the act having the same opera- "tion upon the sections as if they had been specifically "described in it." * * * * * *

"Our judgment is that the title of the plaintiff, at- "taching to the lands in controversy by a location of "route of the road, being followed by a construction "of the road, took effect by relation as of the date of "the act of 1862, so as to cut off all intervening claim- "ants *except in the cases where reservations were spe-* "*cially made in that act*, and the amendatory act of "1864. Such reservations operated as limitations "upon the grant. The limitation upon the grant in "the act of July, 1862, extended to lands sold, *reserv-* "*ed or otherwise disposed of* by the United States, or "to which a pre-emption or homestead claim had at- "tached, and to mineral lands. The amendatory act "of July, 1864, declared that neither that nor the orig- "inal act should defeat or impair any pre-emption, "homestead, swamp land, *or other lawful claim*, or "include reservations or mineral lands other than those "of iron or coal.

"As the sections mentioned could only be known "when the route of the road was established, which "might not be for years, *the government did not in-* "*tend to withhold the lands in the meantime from* "*occupation and sale*, and thus retard the settlement

"of the country, nor to exclude the lands from appro-
"priation to public uses. And the object of the reser-
"vation was to protect the acquisition of rights in this
"way to lands falling within the limits of the grant,
"and to exclude from its operation lands specially re-
"served, and lands of a special character, such as min-
"eral lands other than those of iron or coal, the sale
"of which was seldom permitted anywhere, and swamp
"lands. *The grant made was in the nature of a float,*
"*and the reservations excluded only specific tracts to*
"*which certain interests had attachod before the grant*
"*has become definite*, or which had been specially with-
"held from sale for public uses, and tracts having a
"peculiar character, such as swamp lands, or mineral
"lands, the sale of which was then against the general
"policy of the government. It was not within its
"language or purpose to except from its operation any
"of the designated lands for the purpose of aiding in
"the construction of other roads."

In *Kansas Pacific Railroad Co.* v. *Dunmeyer*, 113 U. S., 629, it is held:

That the line of definite location of a railroad, which determines the rights of railroad companies to land under land grant acts of Congress, is definitely fixed, within the meaning of those acts, by filing the map of its location with the Commissioner of the General Land Office at Washington;

That under the acts granting lands to aid in the construction of a line of railroad from the Missouri river to the Pacific ocean, the claim of a homestead, or preemption entry, made at any time before the filing of that map in the General Land Office, had attached, within the meaning of those statutes, and no land to which such right had attached came within the grant;

That the subsequent failure of the person making such claim to comply with the acts of Congress concerning residence, cultivation and building on the land, or his actual abandonment of the claim, does not cause it to revert to the railroad company and become a part of the grant; that the claim having attached at the time of filing the definite line of the road, it did not pass by the grant, but was, by its express terms, excluded, and the company had no interest, reversionary or otherwise, in it; and that the act of July 3, 1866, 14 Stat. 79, which authorized the Secretary of the Interior to withdraw certain lands from *sale* on filing a map of the general route of the road with him, *did not reserve such lands from entry under the pre-emption and homestead laws.*

And the Court, through Mr. Justice MILLER, at page 634, speaks as follows :

" The record shows that on July 25, 1866, Miller made a homestead entry on this land, which was in every respect valid, if the land was then public land subject to such entry. It also shows that the line of definite location of the company's road was first filed with the Commissioner of the General Land Office at Washington, September 21, 1866. This entry of Miller's, therefore, brought the land within the language of the exception in the grant as land to which a homestead claim had attached at the time the line of said road was definitely fixed. For we are of opinion that under this grant, as under many other grants containing the same words, or words to the same purport, the act which fixes the time of definite location is the act of filing the map or plat of this line in the office of the Commissioner of the General Land Office.

" The necessity of having certainty in the act fixing this time is obvious. Up to that time the right of the company to no definite section, or part of section, is fixed. Until then many rights to the land along which the road finally runs may attach, which will be paramount to that of the company building the road. After this no such rights can attach, because the right of the company becomes by that act vested. It is important, therefore, that this act fixing these rights shall be one which is open to inspection. At the same time it is an act to

be done by the company. The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the Commissioner, or rather, in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party. Of course, as soon as possible, the Commissioner ought to send copies of this map to the Registers and Receivers through whose territory the line runs. But he may delay this, or neglect it for a long time, and parties may assert claims to some of these lands, originating after the company has done its duty—all it can do—by placing in an appropriate place, and among the public records, where the statute says it must place it, this map of definite location, by which the time of the vestiture of their rights is to be determined. We concede, then, that filing of the map in the office of the Commissioner is the act by which the line of the road is definitely fixed under the statute. *Van Wyck* v. *Knevals*, 106 U. S., 360. * * * *

"The record shows that while the company did not file its line of definite location until about two months *after* Miller made his homestead entry, it did designate the general route of said road, and file a map thereof in the General Land Office, July 11, of the same year, 1866, which was fifteen days *before* Miller's homestead entry. This latter map was filed in the office of the Register and Receiver on the 26th of July, one day after Miller made his entry.

"It is argued that until this was done Miller's right of entry remained unaffected.

"But we are of opinion that the duty of filing this map, as required by the act, like that of the line of definite location, is performed by filing it in the General Land Office, which is filing it with the Secretary of the Interior, and that whatever rights accrue to the company from the act of filing it accrue from filing it there.

"What are those rights? This action does not, like the filing of the line of definite location, vest in the company a right to any specific piece of land. It establishes no claim to any particular section with an odd number. It authorizes the Secretary to withdraw certain land from sale, pre-emption, &c. What if he fails to do this? What if he makes an order, as in this case, withdrawing a limit of twenty-five miles from sale, yet permits a party to enter and obtain a patent on some of this land?

"Without answering these general questions, we proceed to show that, by the statutes under which the company claims the land, the

act of filing this map, did not withdraw the land from homestead entry."

And again:

"The company had no absolute right until the road was built, or that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his right became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, etc., for a shorter period, and then payment of the price of the land. It is not conceivable that Congress intended to place these parties as contestants for the land with the right in each to require proof from the other of complete performance of its obligation. Least of all it is to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims and to come between them and the government as to the performance of their obligations.

"The reasonable purpose of the government undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company we do not give any lands we have already sold or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. No interest in the railroad company attaches to this land or is to be founded on this statute. Such is the clear and necessary meaning of the words that there is granted every alternate section of odd numbers to which these rights have not attached. It necessarily means that, if such rights have attached, they are not granted."

In *Sioux City etc. Land Company* v. *Griffy*, 143 U. S., 32, it is held that no right attaches to the railroad company until its map of definite location is filed, citing many cases, and expressly affirming *Pacific Railway Company* v. *Dunmeyer*, 113 U. S., 629.

The time of filing the map of definite location being hence the time when the rights of the company are to be determined, the next question is as to whether at that time the land in controversy was reserved or disposed of by the United States, or whether at that time there was any lawful claim to it.

As appears by the facts of the case hereinabove recited the road was not surveyed until 1868, and was not built until December, 1869, the map of definite location not having been filed until February 1st, 1870. But at this time the State selections were years old, those in township 3 south, range 3 east, having been made in 1863 and 1864, and those in 2 south and 1 east having been made June 12, 1865. It is thus seen that as to the former they were made prior to the filing of the map of general route. All of these selections were regularly listed to the State and patented to the defendants. Some of this listing was shortly after filing the map of definite location and all of it within a few years. The State had, therefore, in satisfaction of her indemnity school land grant, made approved selections of the land in controversy prior even to the survey of the line of railroad and long prior to the filing of the map of definite location. These were "lawful claims" within the meaning of the law, and certainly within that meaning the United States had "*disposed of*" of the lands.

The order of withdrawal of the Secretary made on filing the map of general route is without effect upon these State selections. It was beyond his power to do more than that which the statute directed him to do, to wit, "to cause the lands within twenty-five miles "of said designated route or routes to be withdrawn "from *pre-emption, private entry and sale.*" Under this direction he instructed the Register and Receiver of the local land office as follows (pp. 167 and 168 of Transcript):

"Upon the receipt of this letter you will withdraw from sale, LOCATION, pre-emption and HOMESTEAD the vacant *odd*-numbered sections and parts of sections within 25

miles on each side of railroad as indicated by the diagram herewith.

"The *even*-numbered sections within said limits will be subject to homestead and pre-emption, but not subject to private entry or location."

It is thus seen that the Secretary excluded from the withdrawal *private entry* and included *location* and homestead. The words "private entry" which are excluded are not at all synonymous with "*location.*" A party doesn't locate land when he buys it of the government at private entry; but a State *does* locate land when she selects certain specific land in satisfaction of one of her grants. The pre-emption statute of 1853, appended to this Brief, illustrates the meaning of "private entry," for in section 6 we read therein as follows: "All of said lands that shall re- "main unsold after having been proclaimed and "offered *shall be subject to entry at private sale as* "*other public land, at the same minimum price per* "*acre.*" "*Private entry*" is hence an elliptical phrase for the words "*entry at private sale.*"

Mr. CRANE well says in his Brief filed in this case on behalf of appellants:

"Public sales and private entries were the modes "first adopted for the disposal of the public lands. A "district of land is advertised to be sold at the door "of the District Land Office, commencing on a certain "day; the lands are sold to the highest bidder for "cash, and such sale is continued for a stated time, "when such sales cease; all lands in the district then "remaining unsold are subject to private sale or priv- "ate entry by which any person can go to the Land "Office and purchase such of said land as he desires "by payment for the same in cash. (See Act of May

" 10, 1800; 1 Lester, page 22, sections 4 and 5; also " Act of April 24th, 1820, Ib., page 34.)" See Revised Statutes, Sec. 2353 to 2379.

That the order of withdrawal was not within the statute is clear, and it is so held in *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S., 634. On this we have Mr. Justice MILLER speaking for the Court at p. 638, as follows:

" It will be observed that by the Act of 1862, upon " the filing of the company's map of designation of its " general route, the Secretary was required to with- " draw the lands within fifteen miles of said designated " route from '*pre-emption, private entry and sale.*' " In the terminology of the laws concerning the dis- " position of the public lands of the United States, " each of these words has a distinct and well-known " meaning in regard to the mode of acquiring rights " in these lands. This is plainly to be seen in the " statutes we are construing. In the third section or " granting clause there are excepted from the grant all " lands which at the time the definite location of the " road is fixed had been *sold*, *reserved* or otherwise " disposed of, and to which a *pre-emption* or *homestead* " claim had attached. Here sale, pre-emption and home- " stead claims are mentioned as three different modes " of acquiring an interest in the public lands which is " to be respected when the road becomes located, and " the words are clearly used because they were thought " to be necessary. But a sale for money in hand, by " an entry made by the party buying, is throughout the " whole body of laws for disposing of the public lands " understood to mean a different thing from the estab- " lishment of a pre-emption or homestead right, " where the party sets up a claim to a definite piece of

" land, and is bound to build on it, make fences, culti-
" vate and reside on it for a period of time prescribed
" by law."

The only things, therefore, which could be affected by the filing of the map of general route and by the order of withdrawal being *pre-emption, private entry and sale*, and the State selections being neither one nor the other were unaffected. In other words, the State was at liberty, notwithstanding such filing and such order, to proceed in her own way to satisfy the grants which had been made to her.

II.

But it was said by the Court below that the selections were made on unsurveyed land and were therefore void, the Court holding that lands are not surveyed by authority of the United States until a plat of the survey is on file in the local land office. This is not the law as we understand it; but if it be the law, still the State selections were good, for as to both townships copies of the plats were in the local office. As to T. 2 S., R. 1 E., it is admitted in the opinion (p. 57 of Transcript) that a copy of the plat was on file in the local office, and that the State selections were made and entered after its filing, although they had been refused before.

As to T. 3 S., R. 3 E, we have in our statement of the facts of the case shown that a copy of the plat must have been in the local office as early as January, 1863; and as the tract books of the Register show entries therein of the State selections in controversy, and as complainant did not prove that the Surveyor-General did not do his duty by transmitting a copy of

plat of the survey made by him in 1862 the original of which was on record in his office, we are bound to assume that he did so.

But we submit that it is not the law, that land is not to be deemed surveyed by authority of the United States until a copy of the approved plat has been lodged in the local land office.

It ought not to be a difficult matter to ascertain what constitutes a valid survey of the public lands of the United States. We have only to examine sections 2395 to 2413 of the Revised Statutes, which provides the manner of survey and the officers who shall perform the duty. Sub-division eight of section 2395, reads as follows:

"These field books" (field books of deputy surveyors) "shall be returned to the Surveyor-General, who shall cause therefrom a description of the whole land surveyed to be made out and transmitted to the officers who may superintend the sales. He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the lands, describing the sub-divisions thereof, and the marks of the corners. This plat shall be *recorded* in books, to be kept for that purpose, and a copy thereof shall be kept open at the Surveyor-General's office for public information, and other copies shall be sent to the places of sale, and to the General Land Office."

In sub-division fourth of section 2223 we have one of the duties of U. S. Surveyors-General set out as follows:

"He shall transmit to the register of the respective land offices within his district general and particular plats of all lands surveyed by him for each land dis-

trict; and he shall forward copies of such plats to the Commissioner of the General Land Office."

And in the instructions to Surveyors-General we read at page 723 of 1 Lester's Land Laws:

"Each township plat is to be prepared in *triplicate*, "one for the General Land Office, one for the district "office, and the third to be retained as the *record* "in the office of the Surveyor-General. The original "field books, each bearing the written approval of the "Surveyor-General, are to be substantially bound into "volumes of suitable size, and retained in the Surveyor-"General's office, and certified transcripts of such field "books (to be of foolscap size) are to be prepared and "forwarded from time to time to the General Land "Office."

Now, here we have five separate and distinct facts:

1st. A survey in the field by the proper officer.

2nd. An approval of the survey by the Surveyor-General.

3rd. The platting of the survey by the Surveyor-General.

4th. The making a *record* of the plat in the office of the Surveyor-General.

5th. The transmitting to the local and General Land Offices of a copy of the record so made.

When, then, is the survey complete, so as to be brought within the statute? If the question were as between the survey in the field, and the approval of the surveyor, or the record of the survey, there might be some doubt; but as between the record in the Surveyor-General's office, and the transmitting a transcript of that record to the local land office, how can there be any doubt whatever? How is it possible to say that there has been no survey, simply because a

transcript of the record of the survey has not been sent to the local land office? As well could it be held that the survey is an incomplete thing until the transcript has been sent, as it has to be, to the General Land Office. All the doings of the Surveyor-General's office are subject of approval or disapproval by the General Land Office, and with the same reason it could be contended that until a copy of the plat had reached that office, no State selection could be made at the local office.

Note that the *record* and the *originals*, both of the field notes and the plat, are to be kept in the office of the Surveyor-General; it is but *copies* which are to be sent to the Local and General Land Offices. The official seal of approval is put upon the survey in the office of the Surveyor-General; and, certainly, when that is done, if not before, the land can be said to have been surveyed by authority of the United States.

Under the Act of 1860, providing for the survey of the lands claimed under Mexican grants, the Court in *Mahoney* v. *Van Winkle*, 21 Cal., 583, say: "By that "Act, when a survey has been made and platted, it is "the duty of the Surveyor-General to publish notice "of the fact for four weeks. In the meantime the "survey and plat are to be retained in his office sub-"ject to inspection. If, upon the expiration of the "publication, no publication has been made for a return "of the survey into the District Court for examina-"tion and adjudication, or, if made, the application has "been refused, the survey becomes final. On the "other hand, if the survey be ordered into Court, it "does not become final until it has been approved or "has been modified and reformed by the decree of the "Court. Until the survey is established in one of

" these ways, it is without any binding force. Until " then it is only a preliminary proceeding amounting " in effect to no more than a mere report of the action " of the surveyor, filed in his office for the inspection " of all parties interested, or returned by him into court " by its order for examination and adjudication."

Under this system of establishing the much-disputed boundaries of Mexican grants, the action of the Surveyor-General is, as said above, but "preliminary," and the survey was held not to be complete under the statute until the seal of approval had been set upon it by decree of the District Court; but when that approval has been given, then the survey was a complete and finished thing. Nothing more was necessary to be done beyond that approval. But, under the system of laying out the public lands into townships, sections and subdivisions of sections, where there are no disputed boundaries to engage the attention of a court, the survey becomes complete by the approval of the Surveyor-General. His approval has the same force and effect to make the survey a complete and finished thing as did the approval of the District Court of a survey returned to it under the Act of 1860. The law not only provides for such approval, but provides for the making and keeping a *record* in his office of such approved survey.

And even as to the survey of private land claims, the Supreme Court of Missouri say, in *Dent* v. *Sigerson*, 29 Mo., 503: " There is reason to believe that it " never was contemplated by any of the acts of Con- " gress concerning the public surveys, nor by any " practical construction of them, either here or in the " department at Washington, that a survey, *duly and* " *legally made and approved by the Surveyor-General*

"*here*, of a private claim, had, as a matter of course, "to be transmitted to the General Land Office, and "receive the formal approval of the Commissioner, "and of the department to which he was subordinate, "before it could be regarded as an *authoritative* sur- "vey."

And Attorney-General Cushing, in the matter of Iowa railroad claims (8 Opinions of Attorneys-General, 390), held that by surveying and marking on the ground the lines of proposed railroads, these lines were definitely fixed; it having been contended on the other side that no such result followed until the plats of survey were returned to the Local and General Land Offices. And he says (p. 393):

"Is it necessary, in order to consummate the ex- "propriations and the new appropriations, that a plat "should be drawn up and filed in some public office? "I think not, *unless that be expressly required by the* "*statute*, as the condition of the change of property. "*If not so expressly required as condition of title,* "*such filing of a plat anywhere is but a matter of* "NOTICE. But if the points have been actually marked "on the earth, then the plat is but written authentica- "tion or evidence of that fact, and the filing of the "plat, information or notice of what had been pre- "viously done."

It is a mistake, we take it, to hold that under the land system of the United States the public lands are not *treated* as surveyed until the plat reaches the Local Land Office. The considerations already urged would tend to show this, and indeed it must become apparent on analysis. The confusion arises in not keeping distinctly in view the different functions of the Surveyor-General and the Register. It is the func-

tion or duty of the former to see that the public lands of the United States are properly surveyed; that is, that the entirety of these lands may be divided and sub-divided, and the various divisions and sub-divisions properly designated by monuments, in accordance with an uniform and definite plan; and when any particular parcel of land has been brought under this plan, it is said to be surveyed, and is *treated* as surveyed. This survey is absolutely indispensable to any dealing with the land by its owner—the United States. Without accurate surveys made upon a system of uniformity, confusion inextricable would arise. And such surveys are, hence, the necessary preliminary to a disposal of the land. But when the survey of any township is complete, the function of the Surveyor-General in regard to that particular township ceases—he has no more to do with it, except to keep a record of it in his office, and to give the public such information concerning it as it may desire.

The function of the Register, on the other hand, is to act as the agent of the United States in the disposal of the land which has been surveyed. He can do nothing in his office in regard to any portion of a township of land by way of disposing of it until he has received a copy of the plat of survey from the Surveyor-General. This is necessarily so, because until he has such copy before him, he is quite unable to tell which particular parcel of land it is that a pre-emptioner declares he has settled on, or that the State applies for in part satisfaction of a grant. Hence, it is, that until an approved copy of the township plat is in his office, he is not in position to act upon any application for a State location in satisfaction of a grant;

but this is not to say that such application is absolutely void. It would only be so in the event that the United States authorities had not surveyed the land, and by such survey determined specifically the identity, situation, and boundaries of the land applied for.

At page 722 of 1 Lester's Land Laws will be found a diagram representing the plat of a township laid off in the manner by the instructions of the Commissioner of the General Land Office. By reference to this diagram it will be seen that there must be attached to each plat the designated surveys of both township and sub-division lines; the name of the surveyor of each, date of his contract, the amount of surveys in miles, chains and links, and the time "*when surveyed;*" and that when the field notes of the survey have been examined and approved by the Surveyor General, he must attach to the plat thereof the following:

"The above map of Township No. ....., of "Range No. , ... Meridian, ... is "strictly conformable to the field notes of the survey "thereof on file in this office, which have been exam- "ined and approved.

" .....

"Surveyor General.

"Surveyor General's Office,

"at .....

" ..... 18 ."

The "approved plat of survey" is an elliptical expression for the map platted from the approved field notes of the survey. The Surveyor General does not approve the *plat;* on the contrary, he approves the *field notes;* and from these approved field notes, the

statute provides that "he shall cause a fair plat to be "made of the townships and fractional parts of town- "ships contained in the lands, describing the sub-di- "visions thereof, and the marks of the corners;" and when the plat is thus made, he certifies that it conforms to the field notes. The notes taken in the field are of paramount consequence, because it is by means of them that the land can be definitely located.

McClintock v. *Rogers*, 11 Ills., 279.

The map is but a picture-writing of these field notes, whereby any one is enabled to see at a glance the different divisional and sub-divisional lines established, as well as the character and topography of the country.

But independently of reasoning it can be shown that under the land system of the United States, the public lands *are* treated as surveyed before the plats are filed in the Local Land Office.

The pre-emption law of 1841 (Statutes at large, vol. 5, p. 453) provided for pre-emption settlements on *surveyed* land alone, the procedure being for the beneficiary to make his entry at the Register's office, and to make a certain affidavit. In giving instructions under this Act, the Commissioner of the General Land Office used the following language:

"No pre-emption right exists by reason of a settle- "ment on and inhabitancy of a tract, unless at the "date of such settlement the Indian title thereto had "been extinguished, and the land surveyed by the "United States. The *approval of the plat is the evi- "dence of the legality of the survey;* but in accordance "with the spirit and intent of the law, and for the pur- "pose of bringing the settler within its provisions, the "*land is to be considered as surveyed, when the requi-*

" *site lines are run on the field and corners established* " *by the Deputy Surveyor.*"

In March, 1853, the Act granting to the State of California the sixteenth and thirty-sixth sections (Stat. at large, vol. 10, p. 246, sec. 6) provided that the public lands therein, except the school sections, should be subject of pre-emption whether surveyed or unsurveyed, provided the pre-emption settlement were made on unsurveyed land within one year from the passage of the Act; and this was extended for two years from March 1, 1854, by Act approved on that day (Stat. at large, vol. 10. p. 268). In the Act of 1853, *supra*, it was provided for the first time that the pre-emption entry should be made within three months after the return of the plats of surveys to the Land Offices; and it was further provided that proof and payment should be made prior to the day appointed by the President's proclamation for the commencement of the sale of such lands. And these lands could only be offered for sale after six months' public notice of the time and place of sale, after the plats were filed, thus affording the pre-emptioner ample time to prove his claim and make payment.

In 1862, by Act of May 30th (Stat. at large, vol. 12, p. 410, sec. 7), the privilege of pre-emption settlement was again extended to unsurveyed public land in California, it being made obligatory, as before, that the declaratory statement should be filed within three months " from the date of the receipt at the District " Land Office of the approved plat of the township " embracing such pre emption settlement."

By Act approved June 2, 1862 (Stat. at large, vol. 12, p. 413, ch. 94), the privilege of pre-emption set-

tlement was extended to all the lands belonging to the United States to which the Indian title had been, or should be, extinguished, with the proviso as follows:—

"And when unsurveyed lands are claimed by pre-
"emption, notice of the specific tracts claimed *shall be*
"*filed within six months after the survey has been*
"*made in the field;* and on failure to file such notice,
"or to pay for the tract claimed within twelve months
"from the filing of such notice, the parties claiming
"such lands shall forfeit all right thereto, provided
"such notices may be filed with the Surveyor-Gen-
"eral, and to be noted by him on the township plats,
"until other arrangements have been made by law for
"that purpose." And this proviso remained law until July 14, 1870, when it was repealed. (Ch. 272 of Laws of 41st Congress.)

Section 2,274 of the Revised Statutes reads as follows:

"When settlements have been made upon agricul-
"tural public lands of the United States, *prior to the*
"*survey thereof*, and it has been or shall be ascertained,
"after the *public surveys have been extended* over such
"lands, that two or more settlers have improvements
"upon the same legal sub-division, it shall be lawful for
"such settlers to make joint entry of their lands at
"the local Land Office, or for either of said settlers
"to enter into contract with his co-settlers to convey
"to them their portion of said land after a patent is
"issued to him, and, after making said contract, to file
"a declaratory settlement in his own name, and prove
"up and pay for said land." * * * *

In the instructions to the Register and Receiver

under this law, the Commissioner says, among other things, "*When* the surveyor in the field finds two "or more settlers with improvements on the same "legal sub-division, *a joint entry thereof* will be al- "lowed as heretofore." (Copp's Land Laws, p. 301, No. 360.)

The Act of February 26th, 1859 (Stat. at large, 385), provided that when settlements with a view to pre-emption had been made on sections sixteen or thirty-six before the survey of the lands in the field, such sections should be subject to the pre-emption, and provided for lieu being taken for the sections so pre-empted.

In the case of D. E. Mitchell, which arose under this statute (Copp's Land Laws, p. 483, No. 466), the survey was commenced in the field September 19th, and completed September 30th. The approved township plat was filed in the local office, June 17, 1871. Mitchell's alleged settlement was December 15th, 1870. The Secretary of the Interior says: "*The date* "*of the survey in the field*, and not the time when the "township plat is filed in the local office, is the date "prior to which settlement must be made in order to "give pre-emptors valid claims in school sections. "The Joint Resolution of March 3d, 1857 (11 Stat. "at Large, 254), upon which the claimant in this case "relies, is controlled and explained in this particular "by the Act of February 26, 1859 (11 Stat. at Large, "385), which provides that rights of pre-emption in "school sections shall be recognized when settlements "have been made *before the survey of the lands in the "field.*"

The precise point in this case was as to when the lands were surveyed. Mitchell contended that he had

made his settlement *before* survey, as he had done so in December, 1870, and the plat was not returned to the Local Land Office until June of the following year. But it was decided by the Commissioner, which decision was affirmed by the Secretary of the Interior, that as the survey in the field was completed on the 30th of September, 1870, the settlement of Mitchell took place *after the survey*, and was too late.

The joint resolution referred to in the Secretary's opinion provided that where settlements "shall have "been or shall be made upon the sixteenth or thirty-"sixth sections * * * * before the said sec-"tions *shall have been or shall be surveyed*," which sections had been reserved for school purposes in Minnesota, Kansas and Nebraska, or where such sections had been or might be selected or occupied as town sites "or reserved for public uses *before the sur-"vey*," then other lands might be selected by the proper authorities in lieu thereof

Independently of what is said in the Secretary's opinion as to the Joint Resolution being "*explained*" by the statute, the import in the Resolution of the word "*surveyed*" and "*survey*" is obvious. The sixteenth and thirty-sixth sections having been reserved for school purposes in the Territories of Minnesota, Kansas and Nebraska, and in the States to be erected out of the same, these sections as soon as marked off in the field could be known of all the world; hence the pre-emptor was only protected in case he made his settlement before the time when the land settled on was surveyed; that is, *before a survey in the field;* for by such survey in the field, the school sctions became clearly designated. In other words, by settling on a sixteenth or thirty-sixth section *before*

the survey in the field, he could not positively know he was on inhibited land, and so the liberality of the Government protected him; but, on the other hand, if his settlement was *after* such survey in the field, he must have positively known when he made his settlement, that he was on forbidden ground, and that he deserved no protection.

In the Act establishing the office of Surveyor General of Kansas, New Mexico, and Nebraska (10 Stat. at large, p. 310, sec. 12), the right of pre-emption was extended over the public lands within their territories, and it was provided as follows: "That where "unsurveyed lands are claimed by pre-emption, notice "of the specific tracts claimed shall be filed within "three months *after the survey has been made in the* "*field* * * * * provided said notices may be "filed with the Surveyor General, and to be noted by "him on the township plats until other arrangements "shall have been made by law for that purpose."

And precisely the same provision is made as regards pre-emption filings in Colorado Territory by Act approved June 2, 1862 (12 Stat. at large, p. 413).

So far, pre-emption. As to homestead, we see the same distinction kept up between the fact of survey and the fact of filing a plat of the survey in the Local Land Office. This is manifest from sub-division 5th of the Circular Letter of the Commissioner of the General Land Office of date July 19th, 1865 (2 Lester's Land Laws, p. 258), which reads as follows:

"The law confines homestead entries to surveyed "lands, and although in certain States and territories "noted in the subjoined list, pre-emptors may go on "land *before survey*, yet they can only establish their

"claim *after return of survey*, but must file their pre-
"emption declaration within three months after re-
"ceipt of official plat at the local land office, where
"the settlement was made *before survey*. Where,
"however, it was made *after* survey, the claimant
"must file within three months after date of settle-
"ment." * * * *

In the Act of 1866 quieting land titles in California (14 Stat. at large, p. 218), section third provides "that "where the selections named in section one of this "Act have been made from lands *which have not been* "*surveyed by authority of the United States, but which* "*selections have been surveyed by authority of and un-*"*der the laws of said State*, * * * * such "selections shall * * * when marked off "and designated in the field, have the same force and "effect as pre-emption rights of a settler upon unsur-"veyed public land; and if, *upon survey of such lands* "*by the authority of the United States, the lines of the* "*two surveys shall be found not to agree*, the selection "shall be so changed as to include these legal sub-"divisions which nearest conform to the identical land "included in the State survey and selection."

Thus it appears, without further citation, that the General Government has ever since 1841 made a clear distinction between the survey and the filing a plat of it in the Local Land Office, and that it *has* treated the public lands as surveyed before copies of the plats were sent to the Register. Furthermore, it clearly appears that it is by no means universally true that the public lands have not been held subject to pre-emption until after the filing of the township plat. Instead, the truth is, that there is no distinction in the land system of the United States more sharply defined than that

between the *actual survey* and the *filing of the plat* in the Local Land Office. And we read in *Middleton* v. *Low*, 30 Cal., 605: "There is, in fact, no such tract "of land as that described in the petition until it has 'been located within the congressional township, by "an actual survey and establishment of the lines under "the authority of the United States, and the survey "has been approved by the proper United States Sur- "veyor General. * * * * The tract has "no separate legal entity until the survey is made and "approved under the authority of Congress."

And in *Bludworth* v. *Lake*, 33 Cal., at page 260, the Court says: "After the lands herein mentioned had "been surveyed by the United States, AND the plats "filed," etc.

It would seem, therefore, that the public lands have always been treated as surveyed on the approval of the survey by the Surveyor General, and for special purposes lands have been so treated on an actual survey in the field.

It is true that the rule announced in *Doll* v. *Meador*, 16 Cal., 314, and in *Van Valkenburg* v. *McCloud*, 21 Cal., 330, as to the right of the State to sell the lands covered by her grants in advance of United States survey, was overruled in *Terry* v. *Megerle*, 24 Cal., 610, and that since the decision in the latter case other decisions have followed to the same effect, and that it has become the established doctrine of the California Court that no right of purchase can be initiated to such lands in advance of their survey by authority of the United States; but in none of the cases so holding was it necessary to decide *when* such survey must be deemed to have been made. That question, for the first time, came squarely before the Court in *Oakley* v.

Stuart, 52 Cal., 521, and the Court there held that the survey must be treated as complete when all the field work necessary to it had been done. The question again rose in *Medley* v. *Robertson*, 55 Cal., 396, and the Court affirmed the Oakley case, modifying it, however, by ruling that the survey could not be deemed to be complete until it had been approved by the U. S. Surveyor-General.

In both these cases the only question was, whether an application to purchase from the State any of the lands covered by one of her grants "which had been surveyed by authority of the United States," must be postponed until a copy of the township plat had been lodged in the local land office, and the Court in both cases held that it need not be so postponed, but was valid and effective if made *after* survey, but *before* the lodging of the plat in the Local Land Office.

It must be kept in mind that we have nothing here to do with the dealings between the State and her vendees. Our concern is with the dealings between the State and the United States. On this we can do no better than to quote the apt language of Mr. Justice FIELD, when speaking for the Court in *Frasher* v. *O'Conner*, 115 U. S., 111, as follows:

"The applications were approved by the locating agents of the State, and the lands as selections by the State were afterwards listed to her, and patents were issued to the purchasers or their assignees. According to the findings of the local District Court, the applications and subsequent proceedings were very loosely conducted, and great irregularities are charged against the principal purchaser. But if the locating agents of the State were satisfied with the applications to purchase, and the selections thus made were approved by the Land Department of the United States, and the lands were listed to the State as part of the grant to her, it is not perceived what ground of complaint the loose character of the proceedings furnish to the defendants. Their title is

not advanced by showing how irregularly the proceedings were conducted by parties who obtained the title of the State; and to the general government it is enough that she does not complain, but accepts the selections in satisfaction of the grant to her. The same view was taken by the Interior Department with reference to one of the State selections referred to. It was objected that the selection was invalid because not made in accordance with the provisions of the act of the Legislature of the State, of April 27, 1863. But the Secretary answered that it was not necessary to enter into a consideration of the alleged defects in the application of the purchaser; that was a question between him and the State; that by the seventh section of the act of March 3, 1853, the State was granted indemnity if sections sixteen and thirty-six lay within private grants; that the manner of selecting such indemnity was not specified; that the act of the Legislature had provided for the sale of certain lands belonging to the State, and if purchasers failed to comply with the requirements of the statute, their claims may fail; that the questions to be considered by the general government were, the right of the State to claim the land under her grant, and was the land subject to selection, observing that these were the only questions to determine, as the general government only recognized the State in the proceedings; that 'it was no part of its duty to inquire into the transactions between the State and her purchasers, neither would it go back of the record to ascertain whether as between the State and her agent he complied with the provisions of the statute relating to the sale of granted land.' "

The fact, therefore, that the State sold some of the lands in T. 2 S., R. 1 E., in advance of actual survey by the United States can make no difference. The only question to be considered is as to what took place between the State and the United States—the former acting through her locating agent, and the latter through their land Register. As to the lands in this township, we have seen that they were surveyed in March, 1865, survey duly approved, township plat constructed and properly certified, and that a copy of this plat was lodged in the Local Land Office on June 10th, 1865. Previous to this, selections were attempted to be made of lands embraced in this town-

ship, but such selections were refused. Two days after the Register received his copy of the plat, the State Locating Agent again applied to locate the lands in satisfaction of the indemnity school grant; these locations were approved by the Register; they were entered in his Tract Book, reported to the General Land Office, investigated by that office for conflict, and no conflict having been found to exist, they were, with all due formality of law, listed to the State (pp. 168 to 172 of Transcript). As these selections were made several years before any survey in the field by the railroad company of the line indicated in its map of general route, and four years and a half before the map of definite location was filed, they are abundantly protected under the decisions of this Court.

As for the endorsement on this plat, in the words, "The odd-numbered sections on this plat are granted to the Western Pacific Railroad. See letter of instructions, dated Dec. 23d, 1864," which the Court below mentions in its opinion as imparting notice to purchasers from the State, it is enough to say, that it is not signed by anybody, it is not dated, it doesn't appear when the endorsement was made, it proclaims a falsehood, and the District and General Land Offices acted without any reference to it, and properly gave the land to the State instead of to the railroad company.

As to the lands in T. 3 S., R. 3 E., we have seen that the State sold all of it here in controversy *after survey in the field, and approval of this survey by the U. S. Surveyor-General.* We have seen that a copy of the township plat constructed from this survey must have been lodged with the Register as early as De-

cember 24, 1862; that a copy of an amended plat was filed in the Register's office Dec. 28, 1865, and that another copy was filed there June 4, 1869. The 1865 plat was in his office long before the railroad company made any survey of its line of railroad, and the 1869 plat was there eight months before the filing of the map of definite location.

It is said by Judge SAWYER in his opinion that the plat of 1865 "is not regarded by the Interior Depart-" ment as official, as it had not at that time been ap-" proved and adopted by the Department." We know of no law which requires township plats to be "approved or adopted" by the Interior Department. Even surveys under the eighth section of the Act of July 23d, 1866, "To quiet land titles in California," do not have to be so approved (*Frasher* v. *O'Conner*, 115 U. S., 102).

Even assuming, against the presumption, that a copy of the plat of T. 3 S., R. 3 E., were first lodged in the Register's office in December, 1865; yet we have that officer accepting and entering in his Tract Book in 1863 the selections made at that time by the locating agent of the State (Agreed Statement of Facts, pp. 245 to 247, of Transcript); *and at that time* (1863) *the lands had been actually surveyed, and an approved plat of the survey was of record in the office of the U. S. Surveyor-General.* And all this was approved by the General Land Office; an investigation was had by that office as to conflict, and no conflict having been found, the lands were listed, as in the other cases, with all due formality of law (pp. 172 to 176 of Transcript).

Now, can it be said that, under such circumstances, these selections were void in their inception? Can it

be said that, intervening these selections (assuming for the nonce that no plat was in the Local Land Office until as late a date even as June 4th, 1869), any other right had attached to the land? The railroad grant had not attached prior to this time, for its map of definite location was not filed until February 1st, 1870; and its map of general route, together with the order of withdrawal, was ineffective as against the State selections, for these latter were neither within the category of pre-emption, private entry or sale.

Indeed, the State selections of 1863 (even if there was no copy of plat in Local Land Office until 1869) having been made of lands surveyed by authority of the United States, *no other right having in the meantime intervened*, would have attached at least at this latter time, and so attaching, would have become such "*lawful claim*" under the amendatory act of July 2, 1864, as to undercut the grant to the railroad, and the land have been "*disposed of*" by the United States, within the meaning of the original Act of 1862.

We know of no provision of law (certainly it is not to be found in the laws which cover the indemnity school land grant) that inhibits the State from applying for locations in satisfaction of such grant prior to the receipt at the Local Land Office of a copy of the township plat. If the land sought to be selected has been identified on the surface of the earth by authoritative survey, and a plat of such survey has been approved and recorded by the U. S. Surveyor-General, the application of the State to the Register in advance of his receipt of a copy of the plat might be premature, so far as the Register then acting on it is concerned, but it could not, in the absence of statutory rule on

the subject, and in the absence of some intervening right, be held to be void. The selection must doubtless be made in the Local Land Office, but there is no law we know of which provides that applications to select lieu lands shall not, in any event, or under any circumstance, be made to the Register in advance of his receipt of a copy of the township plat.

II[a]

The State selections were, under the recent authority of *McNee* v. *Donahue*, 142 U. S., 587, confirmed and "disposed of" to the State by the United States. That case holds that the Act of 1866 (Act to quiet land titles in California) is a present grant to the State of indemnity school lands in all cases where such lands were surveyed at the date of the passage of the act and had been sold to *bona fide* purchasers of the State.

That the lands were surveyed as matter of fact and of law at the date of the passage of the act (July 23, 1866), we have already shown, and that the State had sold the land to *bona fide* purchasers is conceded. Even if there was any question on this, the certificates of purchase set out at length in the record would be at least *prima facie* evidence of good faith, and these, on this point, have not been impugned. The certificates of purchase on T. 3 S., R. 3 E., were all issued before February 9th, 1866, the earliest being February 17th, 1864 (pp. 247 to 255 of Transcript). On T. 2 S., R. 1 E., the certificates of purchasers were issued to Martin, March 2, 1863, to Purdy, January 25, 1864, and to English, January 25, 1864. The other certificates were issued subsequently to July 23, 1866 (pp. 265 to 276, Transcript).

As to the land being within the exception of section one of the act as being "land held or claimed under any valid Mexican or Spanish grant," we shall fully discuss this hereafter under other points.*

* Independently of title, however, the fact that Survey not approved by U.S. Gen. until more than 6 months after Act of 1866 took effect.

III.

The Court below, in its opinion, states that the State selections were void because "by the express terms "of the Act of 1853, under which the selections were "made, 'lands reserved by competent authority,' 'lands "'claimed under any foreign grant or title and the "'mineral lands,' are excepted from the operation of "the Act." It occurs to us that this is an obviously mistaken construction. The statute reads (see it hereto appended) as follows: "All the public lands "in the State of California, whether surveyed or unsur- "veyed, *with the exception* of sections sixteen and "thirty-six, which shall be, and hereby are, granted "to the State, for the purpose of public schools in each "township, *and with the exception* of lands appropri- "ated under the authority of this Act or reserved by "competent authority, *and excepting also* the lands "claimed under any foreign grant or title, and the "mineral lands, shall be subject to the pre-emption "laws of fourth September, eighteen hundred and "forty-one;" and in section seven we have provision made for indemnity in certain cases where the sixteenth or thirty-sixth may be lost.

It is, hence, seen quite clearly that the exception applies exclusively to *pre-emption, and to nothing else.* Pre-emptors were given the right to settle on unsurveyed land, with the following exceptions, each exception constituting a distinct category:

1. 16th and 36th sections, which were granted to the State;
2. Lands appropriated under authority of the act;
3. Lands reserved by competent authority;
4. Lands claimed under any foreign grant or title;
5. Mineral lands.

We cannot see how it is possible to read the statute otherwise. And so far from the Act of 1866 ("To quiet land titles in California") excepting, in all cases and at all events, land held or claimed under Mexican or Spanish grant, this Court certainly held otherwise in *Huff* v. *Doyle*, 93 U. S., 558; for there it was ruled that so far as unsurveyed land was concerned, the condition of the grant at the time of the assertion of the State claimant's right under the third section of the act was the controlling feature, and not such condition at the time of the act's taking effect; and that, *if at that time*, the land in question had been excluded from the grant by final survey, the exception had no application.

Neither *Huff* v. *Doyle* nor *Aurrecoecha* v. *Bangs*, 114 U. S., 381, involved any question of construction of the Act of 1853, nor can either one help out the case of the railroad company. The whole question in each of these cases was one of conflicting rights between the pre emptor on the one side, and the State claimant on the other, this Court taking the view that he had the better claim who was the first to assert his right at the District Land Office after the reception there of the township plat. In *Huff* v. *Doyle*, it was accordingly held:

1. That the State claimant under the Act of 1866 undercut the pre-emptor, the former having asserted his right as soon as the township plat was filed, and

in accordance with such proof, the land having been certified to State for his benefit.

2. That if at the date of such assertion of right, the final survey of the grant has excluded the land selected, the State claimant is a beneficiary of the third section of the Act of 1866.

3. That the Statute of 1866 must be so construed that the exception of lands "held or claimed under a valid Mexican or Spanish grant" shall be determined as of the date when the claimant, under a State selection, undertakes to prove up his claim after the surveys have been made and filed, and within the time allowed thereafter to pre-emptors.

In *Aurrecoechea* v. *Bangs*, the pre-emptor was held to have the better right as against the party claiming the benefit of the third section of the act by virtue of his State selection, *Huff* v. *Doyle*, being affirmed and distinguished. It was accordingly held:

1. That if the holder of the State selection assert his right under the third section of the Act of 1866 before any other right has attached, such selection will be made good by the act, if, at the time of assertion, the final survey of the Mexican grant shows it to be outside of the grant.

2. That a pre-emptor who asserts his pre-emption right in the proper way at the local Land Office, *after* the land is subject of location, and *before* the assertion by the holder of the State selection of any right claimed by him under Act of 1866, can hold his patent subsequently obtained as against the State claimant, the latter having no superior equity which could be held to control it.

But it is said by Judge SAWYER in his opinion that in the *McLaughlin Case* (*U. S.* v. *McLaughlin*, 127

U. S., 428), this Court has "held, after the most "mature consideration, that in case of a floating "Mexican grant of a specified quantity of land within "large exterior bounds, the lands within such exterior "boundaries are public lands," if enough land is left to satisfy the float, and would enure to a railroad company under its grant. Now, if land so situated be PUBLIC LAND, why would it enure to the railroad company, and not to the State in satisfaction of her school land grant? If it is public land for one, why is it not public land for the other? The United States authorities certainly treated all the grant outside of the Lewis survey of 1854 as public land; it surveyed it as such, and made and filed township plats of it as such; it was selected as such by the State, and listed to her by the Department of the Interior as such. The Dyer survey of 1865, covering ten leagues, was a fraud so patent that it was set aside summarily, with instructions to make a survey covering two leagues, which was accordingly made inside the lines of the Lewis survey. If the doctrine of the McLaughlin case can be stretched to cover a case like the Pocitas grant, then the State must certainly stand on an equal footing with the railroad company. If the land within the exterior boundaries of the grant was not "*reserved*" for one, it could not have been "*reserved*" for the other. As we have conclusively shown, there was no such exception in the Pre-emption Act of 1853, covering the school land grant, as was supposed to be there by Judge SAWYER; but if the exception were in the words claimed, *then, under the decision in the McLaughlin case, the words are to be so construed as to make them applicable to such grants as cover specific tracts, and not to floats.*

And in this connection, we beg to call attention to the case of *Durand* v. *Martin*, 120 U. S., 369, which arose on the very grant here in question (Las Pocitas), wherein the defendant in error is one of the appellants to this record, and wherein was involved some of the land here in controversy. The plaintiff in error was defendant in the Court below in an action of ejectment, he claiming the right of a pre-emptor; the judgment was against his right, and this Court affirmed the judgment, and sustained the State title in controversy here. On the point we are now discussing, we have Chief Justice WAITE speaking for the Court as follows:

"If the title of Martin was ever at all defective, it was because at the time of the selection the land was within the boundaries of a claim under a Mexican grant, and therefore not then, in a strict legal sense, public land; but the United States have never objected to the title of the State because of this. On the contrary, after a survey had been made and approved by the Surveyor-General of the United States for California, which excluded the land from the grant, the proper officer of the United States listed it to the State under the act of August 3, 1854, c. 201, 10 Stat., 364, now § 2449 of the Revised Statutes, as indemnity school lands which have been properly selected, and from that day to this, so far as the record shows, the United States have never disputed the title of the State or its grantee. This survey was made in 1869, the claim having been finally confirmed in 1860. As the survey was not made until more than ten months after the act of July 23, 1866, c. 219, 14 Stat., 218, 'to quiet land titles in California' had become operative, its approval by the Surveyor-General had the effect under the ruling of this Court in *Frasher* v. *O'Conner*, 115 U. S., 102, of opening all lands within the exterior boundaries of the grant, but outside of those fixed by the survey, to selection or pre-emption entry as public lands subject only to a defeat of title if in the end the survey as made should be set aside and the boundaries of the grant finally extended so as to include the selection or the entry."

This is all the more important here, for it is a deliverance of the Court prior to its decision in the

McLaughlin case, wherein the rule is carried still further as to floating grants to which the Pocitas grant has been treated as belonging.

But the truth is (and the record so shows), that the land in controversy was never held or claimed beyond the boundaries of the Lewis survey. The Mexican grantee (Livermore) directed how that survey should be made, and never made any claim outside of it. The first Dyer survey was void by reason of its fraud, and this is the rule as to such surveys. In *Coan* v. *Flagg*, 123 U. S., 117, it is held that the excess of land surveyed beyond that covered by the grant *may be so great* as to make the survey fraudulent and void; and certainly swelling the specific quantity of *two* leagues to *ten* must be such an excess as to bring it within the rule of the case cited.

Certainly, if the first Dyer survey had the effect to put the Pocitas grant within the class of grants claimed under a "foreign grant or title," then the conclusion inevitably follows that the land within the exterior boundaries of the grant (the survey having extended to such boundaries) were "*reserved*" within the meaning of the railroad act, and could never have passed to the company, for the grant patent did not issue until May, 1872; and if, on the other hand, the survey had no such effect, the lands were public lands and were subject to State selection.

IV.

It may well be questioned whether the Pocitas grant is within the *McLaughlin case*. Unless it is, the railroad company has no standing whatever. Let us inquire into the nature of the Pocitas grant.

The grant in the original is to be found in the Tran-

script at page 278, and in the translation at pages 280 and 281. The latter reads as follows:

"GRANT OF LAS POCITAS TO JOSE NORIEGA AND ROB'T LIVERMORE.

"Whereas, Don Jose Noriega and Don Roberto Livermore have petitioned, for their own benefit and that of their families, *the place known by the name of* "*Las Pocitas*," bounded by the borders of the hillocks of Las Pocitas, which are in the willow grove de la Agua, as far as the mountain range of Buenos Ayres, and the hills of "Las Cuevas," having previously complied with the requirements and investigations in the matter: Now, in the exercise of the authority in me vested, in the name of the Mexican nation, I have thought proper *to grant them said place, declaring the same to be their property by this letter patent.* Said concession is understood to be in entire conformity with the laws, subject to the approval of the exc't department a board of the Supreme Government, and under the following conditions:

"1. They may fence it, without obstructing crossways, roads and servitudes. They shall enjoy it freely and exclusively, appropriating it to the use or culture they may deem fit, but within a year they will build a house, which they will cause to be inhabited.

"2. When the property shall be confirmed to them they shall solicit the respective judges to give them judicial possession by virtue of this patent, by whom the boundaries shall be marked, at the limits of which, besides the landmark, he shall set some fruit trees or else wild ones of some usefulness.

"3. The land of which donation is made is of two leagues, little more or less, as thediseno annexed to theproceedings, with its respective limits, explains. The judge who shall give possession will cause the same to be measured agreeably to ordinance in marking the boundaries, leaving the excess (sobrante) which may result to the nation for such uses as may be deemed convenient.

"4. If they shall contravene to these conditions they shall lose their right to said land, which may denounced by any other person. I therefore command that, holding these presents to be a firm and valid title, the same be entered in the proper book and be returned to the interested parties for their own security and other purposes.

"Given in Monterey, April 10th, 1839.

(Signed) "JUAN B. ALVARADO.

"MAN'L JIMENO,

"Secretary of State."

It is thus seen that the grant is not only given very specific and well known boundaries, but that it is given the specific name of *Las Pocitas*—"*the place known by name of Las Pocitas*," and *this place* within the designated boundaries is declared to be the property of the grantees. It would hence seem to have elements common to two of the three classes of Mexican grants mentioned by Mr. Justice BRADLEY in the *McLaughlin case*—that which embraces lands that are granted by some specific name, where the grantee is entitled to the whole place granted, and that which embraces floats.

The Land Commission, on confirming the grant, gave its boundaries in the most specific way (p. 283 of Transcript), as did the U. S. District Court in its decree of confirmation (pp. 286 and 287 of Transcript), this latter describing the land as follows:

"The *land of which confirmation is hereby made is* "*known as 'Las Pocitas,'* and is bounded and described "as follows, to wit: On the north by the Lomas de "las Cuevas, on the east by the Sierra de Buenos "Ayres, on the south by the dividing line of the estab- "lishment of San Jose, and on the west by the rancho "of Don Jose Dolores Pacheco, containing in all two "square leagues, *provided that quantity be contained* "*within the boundaries named, and if less than that* "*quantity be contained therein, then that less quantity* "*is hereby confirmed.*"

This declaration of the District Court was affirmed by the U. S Supreme Court in all its parts (pp. 287 and 288 of Transcript).

That the boundaries were readily ascertainable on the ground is shown conclusively by the deposition of Hopkins, to be found at pages 83 to 92 and at pages

107 to 109 of Transcript of Record; and also by the deposition of Duerr (pp. 92 to 103 of Transcript).

The language in the decree of confirmation, as well as in that of the grant, would seem to embrace a specific piece of land with well-known boundaries, the granting officer supposing the boundaries to include but about two leagues; but be this as it may, the Government of the United States, that had authority to construe and to locate the grant, construed it to be a float covering but two leagues, and patented it accordingly.

The question then arises what rights the Mexican grantees had to the "place known as Las Pocitas," as that place was declared to be bounded, up to the time of its final location by the United States Government. This is answered by the language of the grant itself. They could fence it; they could "enjoy it freely and exclusively;" they could "appropriate it to the use or culture they might deem fit;" and "when the property shall be confirmed to them, they "shall solicit the respective judge to give them "judicial possession by virtue of this patent, by whom "the boundaries shall be marked, at the limits of "which, besides the landmark, he shall set some "fruit trees, or else wild ones of some usefulness."

That this gave the right to the Mexican grantees to exclusively possess the particular place known as Las Pocitas, as that place lay within its exterior boundaries, until final segregation by the United States, there would seem to be but little question. This right was guaranteed by the treaty of Guadalupe Hidalgo, and, independently of that right, by international law. The language of Mr. Justice FIELD on this subject, in the leading case of *Teschemaker* v.

Thompson, 18 Cal., pp. 23 to 25, is so happy and pertinent that we feel compelled to here quote it:

"When, therefore, California was ceded to the United States, the rights of property of its citizens remained unchanged. By the law of nations, those rights, in the language of the Supreme Court, were 'sacred and inviolable,' and the obligation passed to the new Government to protect and maintain them. The obligation was political in its character, binding upon the conscience of the new Government, and to be executed by proper legislative action when the requisite protection could not be afforded by the ordinary course of judicial proceedings in the established tribunals, or by existing legislation.

"But, independent of the obligations arising from the law of nations, the United States, by the treaty of Guadalupe Hidalgo, in effect stipulated for the protection of the rights of property of the inhabitants of the ceded territory. By the eighth article, they provided that Mexicans established in the territory might remain there or remove to the Mexican Republic, and retain their property, or dispose of the same and remove the proceeds. This provision for the retention of the property was an idle and deceptive one, if it did not carry with it a corresponding obligation of the new Government to protect the property thus retained. Such obligation it did in fact imply, and this obligation was as sacred and binding as if it were stated in express terms.

"The term 'property,' as applied to lands, embraces all titles, legal or equitable, perfect or imperfect. Such was held by the Supreme Court to be the import of the term in a stipulation contained in the treaty by which Louisiana was acquired, providing that the inhabitants of the ceded territory should be protected in their property. It 'comprehends,' said the Court, in *Soulard* v. *The United States*, 'every species of title, inchoate or complete. It is supposed to embrace those rights which are executory, as well as those which are executed. In this respect, the relation of the inhabitants to their Government is not changed. The new Government takes the place of that which has passed away.' (4 Peters, 511.) And the same Court, in a subsequent case, after referring to the same stipulation in the Louisiana treaty, observed that, 'No principle is better settled in this country than that an inchoate title to lands is property.' (*Delassus* v. *The United States*, 9 Peters, 133.) It matters not, therefore, whether the Mexican grant, upon which the patent of the plaintiffs was issued, passed a perfect title to the premises, or only an interest

which required further action of the Government for its perfection. We are not informed by the record whether it was of a specific tract with defined boundaries, or was only of a specific quantity lying in an area of larger extent. We shall assume for the purposes of the present appeal that it was of the latter character, and conveyed only an interest requiring further action of the Government, and that such action was not had previous to the cession—in other words, that it conferred a merely equitable title, which was never perfected under the former Government. The title still constituted property within the decisions of the Supreme Court, which we have cited, and as such the Government of the United States was under obligation to protect it by the law of nations, and by the stipulations of the treaty."

The first Dyer survey was, indeed, fraudulent and void, because it swelled a float of two leagues up to a float of at least five times that amount, but it nevertheless was within the exterior boundaries of the grant, as Hopkins in his deposition, cited above, conclusively shows, and by that survey all of the land in controversy was included. (See Hopkins' Map designated in vol. 2 of Transcript as "Exhibit Hopkins.")

We have, then, a grant, wherein the land granted is given the name of "THE PLACE *known by the name of* "'*Las Pocitas*'"; that place is given boundaries which are particularly specific, which are easily ascertainable on the ground, and which do not include much, if any more, than ten square leagues. No question was ever made by any one of the genuineness of the grant, and it passed unscathed through every tribunal which was called upon to deal with it. All this being so, we submit, with some degree of confidence, that the *McLaughlin case* does not cover it. In the first place, the Moquelamos grant was a fraudulent and forged one, Mr. Justice BRADLEY denouncing it as "a "wretched fraud;" in the second place, its boundaries were indeterminate, and covered, so far as they could

approximately be made out, a belt of country seventy or eighty miles in length by from six to ten miles in width; and in the third place, the language of the asserted grant was entirely different from that of the Pocitas grant. We here beg to quote the necessary parts of it, the italics being our own :

"Pio Pico, Constitutional Governor of the Department of California. Inasmuch as Andres Pico, a Mexican by birth, has solicited for his personal benefit and that of his family, *the land known by the name of "Moquelamos"* TO THE EXTENT OF ELEVEN SQUARE LEAGUES; having first made the necessary inquiries and investigations according to the requisition of the laws and regulations; using the faculties in me vested, in the name of the Mexican nation, I have now ceded the land mentioned, declaring it his property by these presents, subject to the approval of the Most Excellent Department of Assembly, and under the following conditions:

"1st. *He will be the owner in fee of* ELEVEN LEAGUES on the river "Moquelamos," bordering on the north upon the southern shore of said river, on the east upon the adjacent ridge of mountains, on the south upon the land of Mr. Gulnak, and on the west upon the estuaries of the shore.

"2nd. *The land which he is hereby ceded* he will keep free from obligations, mortgage, and every other encumbrance, and he will not convey it in mortmain.

"3rd. He will apply to the proper Justice to give him judicial possession by virtue of this title, who will designate the boundaries, placing the usual land marks.

"4th. He may enclose it without prejudice to the ways, roads and servitudes.

"He will enjoy it fully and exclusively, appropriating it to such culture and use as may best suit him, but he must not sell it till four years after he shall have obtained judicial possession."

The difference between the two grants, as to the particular thing granted, is vital and essential. In the one, a particular place by a well known name is granted, while in the other, the grant merely covers eleven leagues of land, which are to be located within widely

extended exterior boundaries. In the one, all the language of the grant is specifically directed to a particular and well known place, while in the other, it is directed to the eleven leagues granted, and which can be located as well in one locality as in another, so long as it is placed within the exterior boundaries mentioned in the grant. It is perfectly obvious, that, giving the character of float to the Pocitas grant, yet the location of the grant could never be properly floated away so as not to cover *the place* known as "*Las Pocitas*." This particular place must necessarily be covered in locating the grant. The only question which could arise on the survey (and this is in fact all the question that ever arose), was as to what the boundaries of that particular place were.

And note, finally and particularly, that in the one, the Las Pocitas *place* is the thing granted, while in the other, it is "the *land* known by the name of 'Moquelamos,' TO THE EXTENT OF ELEVEN SQUARE LEAGUES."

Under all the circumstances of the *McLaughlin case*, it is not surprising that the rule laid down in *Newhall* v. *Sanger* should have been modified, for as Mr. Justice BRADLEY well said:

"A grant of eleven square leagues is made out of a "country seventy or eighty miles in length, and from "six to ten in width, containing over eighty square "leagues; and this whole eighty leagues is supposed "to be retired from the disposable public domain for a "period of years, no one knows how long. Does this "look reasonable?"

Indeed, it does not look reasonable, particularly when applied to a forged grant.

We call particular attention to the fact that Mr. Justice BRADLEY, in *the McLaughlin case*, puts into

his classification of Mexican grants a class of grants wherein the grant is of a certain place or rancho by name where the donee is entitled to the whole place or rancho. The Las Pocitas grant does certainly bear some of the elements of such a class, for it is not only *a place* which is granted, but it is "THE *place known by the name of Las Pocitas*," and the grantees are given the right to use the whole of this place. If this be so, then, independently of the other considerations we have urged, *U. S.* v. *McLaughlin* would not, but *Newhall* v. *Sanger* would, furnish the rule applicable to the case at bar. And in regard to the latter case, we call attention to the fact that the dissent of Justices FIELD and STRONG is based upon the fact of the "Moquelamos grant" being a forged and fraudulent one.

We therefore submit, that until the patent was issued in May, 1872, or at the very earliest, until the approval of the final survey by the U. S. Surveyor-General on May 11, 1870, the lands within the exterior boundaries of the Pocitas grant were *reserved* within the meaning of the railroad acts, and, therefore, that no part of these lands could have passed, or did pass, to the railroad company.

The State title, hence, (on the point now under discussion) is secure under either one of the following alternatives:

1st. If the lands lying beyond the boundaries of the Lewis survey were never claimed, or were never treated by the General Land Department as having been claimed, by the Mexican grantees, then they were susceptible of State selection.

2d. If, on the other hand, they *were* so claimed,

then they were excepted out of the railroad grant, and complainant has no case.

3rd. If the grant was a float within the meaning of the *McLaughlin case*, so that the surplus lands within its exterior boundaries were susceptible of passing under the railroad grant, then these surplus lands were likewise susceptible of passing under State selections. If they were public lands for one they were public lands for the other.

4th. And finally, if the Pocitas grant cannot properly be considered to be a float within the meaning of that term as defined in the *McLaughlin case*, then the lands within the exterior boundaries of the grant were all "reserved" within the ruling of that case as modifying and distinguishing *Newhall* v. *Sanger*, and hence were excepted out of the railroad grant.

V.

Whether we consider the case on the demurrer or on the whole record, the decree, we respectfully submit, warranted no relief at the hands of the Court below, and should have been dismissed. In *Colorado & Iron Co.* v. *U. S.*, 123 U. S., 307–316, and *The Maxwell Land Grant case*, 121 U. S., 325, 379, 381, it is held that in actions brought to annul Government patents, the Government must make the strictest and clearest proof, and this not only where the proof is of an affirmative nature, but where it is of a negative nature as well; and Mr. Justice MILLER, speaking for the Court in *Kansas City etc. R. R. Co.* v. *Attorney General*, 118 U. S., at page 695, says: "While we "are not disposed to hold the action of the officers of "the Land Department of the Government as abso-"lutely conclusive upon such a subject as this, we see

"no reason why their deliberate action, with careful "attention, and all the means of ascertaining what was "right, should be set aside in this case." What that action in the matter of the State selections here in controversy was, we have seen. It was deliberate, it was founded upon full information, and its lists, which had the effect of patents in conveying the title to the State (*Frasher* v. *O'Conner*, 115 U. S., 102), were certified and delivered to the State, one in September, 1870, one in March, 1871, one in November, 1871, and one in March, 1873—that is, from *ten to thirteen years before* the Bill of Complaint was filed.

Judge SAWYER states in his opinion, by way of saving the company from the penalty of laches, that the railroad company was "active in pursuing its right "before the Department." How *active* they were is shown by the fact, *that they did not apply to the Register for the lands until more than four years after the filing of the map of definite location.* And this is significant, because at that time, February, 1870, the plat of T. 2 S., R. 1 E., had been in the Local Land Office for four years and a half, while that of T. 3 S., R. 3 E., had been there almost certainly for seven years, and beyond all doubt for four years; and even if we take the date when the latest plat of this township was filed (June 4, 1869), we shall have a point of time eight months anterior to the time when the right of the railroad company became fixed by the filing of their map of definite location. At the time when they applied for the land the whole of that in controversy had been listed to the State, and the Register and Receiver, on rejecting the application, so informed them (pp. 177 to 181 of Transcript). Thereupon the company, instead of instituting proceedings in the Courts

against the claimants under the State, as it could have at once done (for if its right was paramount to that of the State, its title vested on the filing of the map of definite location—no patent being needed—as held in *Deseret* v. *Tarpey*, 142 U. S., 241), it began and conducted proceedings in the Department of the Interior, to the end of seeking to have that Department make patents to it of land which had already been conveyed to the State, and over which, consequently, the Department had no jurisdiction. And the pursuit of this *ignis fatuus* is to be deemed such diligence and activity as will save the company from the penalty of its laches! In California five years is the longest limit of time available to a party standing in the predicament of the railroad company, and this is hence the time which Courts of Equity dealing with questions arising upon land titles in California will hold to be applicable. Now, the Statute of Limitations begins to run at the moment of time the party could begin his suit. This moment of time for the railroad company was the first day of February, 1870, when the map of definite location was filed, for at that time the company acquired its title. If it did not acquire its title then, it has never acquired it. *Deseret* v. *Tarpey*, 142 U. S., 241, holds specifically that title to all land earned under the grant passed to the company the moment the map of definite location was filed, and that no patent was needed to make the title complete. The subsequent patent could, indeed, add nothing to the title; its effect would be simply to give security to possession under it, and furnish, besides, convenient evidence in the event that that possession was disturbed, or the right on which it was based was ever questioned; but the

title would be as good without the patent as with it. On February 1st, 1870, the company had title to the lands in controversy (if it ever had title), and it had a cause of action against every one of the defendants to the Bill which has furnished the basis of this suit. Every question could have been raised and tried in an action brought at that time which has been raised and tried in this suit; and yet, instead of bringing such an action, it pursued in the Interior Department unwarranted proceedings to obtain that which if it had obtained would have conveyed nothing which it did not already possess. And the Court below sustained the Bill as against the contention of defendants that the railroad company was the real party in interest, and that the Government was without interest, upon the ground that the company having earned the land the Government was "legally bound to make a good title," overlooking the fact that a good title (if the law was what it was held to be by the Court) had passed thirteen years before the filing of the Bill, and that the company had had it in its power, at any time within those thirteen years, to institute proceedings in the Courts by which it could not only have ejected the State claimants, but have quieted its title as against them, if the State selections were of no validity.

That the lists to the State are in law the same as patents, and have the same effect, and must be treated by the Courts with the same consideration, is expressly ruled in *Frasher* v. *O'Conner*, 115 U. S., 102. The Court will hesitate to annul and vacate a patent, unless the case be one which absolutely demands it. The rule as to what is necessary to be shown in a case where it is sought in a direct proceeding to annul

a muniment of title emanating from the Government is succinctly stated by Mr. Justice MILLER, speaking for the Court, in *Maxwell Grant Case*, 121 U. S., at page 381, as follows:

"We take the general doctrine to be, that when in a Court of Equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a Court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

Still less will the patent be set aside at the suit of the Government, when it is shown that the Government has no interest in the controversy, and where for many years before the interposition of the Federal authority on behalf of a person asserting a grievance, that person could, at any time during those years,

have protected himself, but did not choose to do so. Having let the Statute of Limitations run on the possession of defendants, the railroad company seeks by its bill to obtain a decree clouding defendants' title, and to obtain U. S. Patents, from which it hopes to start a new point of time from which the Statute of Limitations may be held to run. If it succeed in all this, these defendants will lose their land, which is now of greatly increased value, and of which they have been in actual possession for more than a quarter of a century. Such injustice will certainly not be worked by this Court short of a necessity which is paramount and imperious.

The bill, as we have shown in the argument on the demurrer, is wholly wanting in all proper allegations for a bill framed for relief on the ground of mistake; but if it be assumed that the demurrer was properly overruled, yet the Court should have held the complainant down to those proofs which were within the averments of the bill; and as there is no mistake alleged about anything connected with the State selections, or the surveys on which they were based, no proof which bore upon those matters was at all relevant, or competent to be considered. The only mistake averred is as to the listing; but here there was no mistake of any kind proved such as a Court of Equity would entertain a bill to rectify filed by the party who had himself committed the mistake.

This suit is brought by the United States without interest; the parties in interest are foreign to the action; and it is not pretended that the United States are under any obligation to the actual parties in interest, but to their grantor. The objection by demurrer that the action is wholly for the benefit of the

grantees of the railroad company not even named in the bill, is further strengthened when the case is considered on the whole record. It appears that these beneficiaries, for whom this litigation has been undertaken by the sovereign authority, *are not even known*. The attorney active in the prosecution of this suit was Mr. F. H. Waterman, of the firm of Shafter, Parker & Waterman, the District Attorney merely performing a perfunctory part (Deposition S. G. Hilborn, U. S. District Attorney, p. 143 of Transcript). There is no further disclosure in the record as to these mysterious grantees (the actual parties in interest), other than the deposition of F. H. Waterman, who, after testifying that he was the actual and active attorney in the action, says as follows:

Q. 7. I didn't ask you about that. Who are the real parties in interest in this suit?

A. I don't know as I am able to tell all of them.

Q. 8. Do you know any of them?

A. I think I do.

Q. 9. State who they are?

A. The first that occurs to me are the heirs—the wife and children of E. Dyer, and the surviving brother, E. H. Dyer.

Q. 11. Do you know any others that are interested?

A. Yes, I think I do; but am not certain.

(Deposition of F. H. Waterman, page 146 of Transcript.)

There is a marked difference between the case at bar and the cases which have been examined on the point now under discussion. If we take the case of *U. S.* v. *Beebe*, for example, the legal title, if the

suit should have been upheld, would have become vested in the United States, subject to the equities of the parties in interest. The Government, there, was a necessary party, through whom title was to run from the defendant to the party in interest, and such title must rest for an instant, at least, with the United States. In the case at bar, however, such is not the fact; for the Government has wholly parted with its legal title, if not to the State of California, then to the railroad company, by a grant "*in præsenti*," and the Government is not even a conduit through which it is necessary for the title to pass.

In conclusion, we respectfully submit that the decree should be reversed and the bill dismissed.

EDWARD R. TAYLOR,
Of Counsel for Appellants.

HENRY F. CRANE,
Solicitor for Appellants.

APPENDIX.

AN ACT TO PROVIDE FOR THE SURVEY OF THE PUBLIC LANDS IN CALIFORNIA, THE GRANTING OF PRE-EMPTION RIGHTS THEREIN, AND FOR OTHER PURPOSES. (APPROVED MARCH 3, 1853.)

SECTIONS 6 AND 7 OF STATUTE.

"SEC. 6. *And be it further enacted*, THAT ALL THE PUBLIC LANDS IN THE STATE OF CALIFORNIA, WHETHER SURVEYED OR UNSURVEYED, *with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands*, SHALL BE SUBJECT TO THE PRE-EMPTION LAWS OF FOURTH SEPTEMBER, EIGHTEEN HUNDRED AND FORTY-ONE, with all the exceptions, conditions and limitations therein, except as herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules and regulations now governing such sales, or such as may be hereafter prescribed: *Provided*, that where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices, and proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the sale, including such lands; the entry of such claims to be made by legal subdivisions, according to the United States' survey, and in the most compact form: *And provided further*, That the fact of persons having heretofore had the benefit of said act of the fourth of September, eighteen hundred and forty-one, shall interpose no bar to their obtaining the benefits of this act; *and all of said lands that shall remain unsold after having been proclaimed and offered, shall be subject to* ENTRY AT PRIVATE SALE as other public land, at the same minimum price per acre; and the register or receiver shall not be entitled to any percentage or fees, except for deciding pre-emption cases, when each of them shall be allowed the same fees as are paid to other like officers; but the receiver shall be entitled to his actual necessary expenses, going and returning, in making his deposits: *Provided*, That nothing in this act shall be construed to authorize any settlement to be made on any public lands not surveyed, unless the same be made within one year from the passage of this act; nor shall any right of such settlers be

recognized by virtue of any settlement or improvement made of such unsurveyed lands subsequent to that day: *And provided further*, That this act shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any pre-emption right to the same.

"Sec. 7. *And be it further enacted*, That where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, *other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled, 'An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for,'* and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands."

United States Statutes at Large, Vol. 12, page 489.

AN ACT TO APPROPRIATE LANDS FOR THE SUPPORT OF SCHOOLS IN CERTAIN TOWNSHIPS AND FRACTIONAL TOWNSHIPS NOT BEFORE PROVIDED FOR. (Approved May 20, 1826.) REFERRED TO in foregoing Statute of March 3, 1853.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, to make provision for the support of schools in all townships or fractional townships for which no land has been heretofore appropriated for that use, in those States in which section number sixteen, or other land equivalent thereto, is by law directed to be reserved for the support of schools in each township, there shall be reserved and appropriated, for the use of schools, in each entire township, or fractional township, for which no land has been heretofore appropriated or granted for that purpose, the following quantities of land, to wit: For each township or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters, of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and

not more than one-half, of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land.

"Sec. 2. *And be it further enacted*, That the aforesaid tracts of land shall be selected, by the Secretary of the Treasury, out of any unappropriated public land within the land district where the township for which any tract is selected may be situated; and, when so selected, shall be held by the same tenure, and upon the same terms, for the support of schools, in such township, as section number sixteen is or may be held, in the State where such township shall be situated.

"Sec. 3. *And be it further enacted*, That there shall be selected, in the manner above mentioned, one section and one quarter section of land, for the support of schools within that tract of country usually called the French grant, in the county of Sciota and State of Ohio." (*Lester's Land Laws*, Vol. 1, p. 39.)

AN ACT TO AID IN THE CONSTRUCTION OF A RAILROAD AND TELEGRAPH LINE FROM THE MISSOURI RIVER TO THE PACIFIC OCEAN, AND TO SECURE TO THE GOVERNMENT THE USE OF THE SAME FOR POSTAL, MILITARY, AND OTHER PURPOSES. (Approved July 1, 1862.)

SECTIONS 3, 4 AND 7 OF STATUTE.

"Sec. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, *not sold, reserved, or otherwise disposed of by the United States, and to which a pre emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

"Sec. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: *Provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

"Sec. 7. *And be it further enacted*, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning as herein provided, to the western boundary of Nevada Territory before the first day of July, one thousand eight hundred and seventy four: *Provided, That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale;* and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as

may be necessary for the purposes herein named: *Provided*, That in fixing the point of connection of the main trunk with the Eastern connections, it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches, as hereinafter provided."

United States Statues at Large, Vol. 12, page 489.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO AID IN THE CONSTRUCTION OF A RAILROAD AND TELEGRAPH LINE FROM THE MISSOURI RIVER TO THE PACIFIC OCEAN, AND TO SECURE TO THE GOVERNMENT THE USE OF THE SAME FOR POSTAL, MILITARY, AND OTHER PURPOSES." APPROVED JULY FIRST, EIGHTEEN HUNDRED AND SIXTY-TWO. (Approved July 2, 1864.)

SECTION 4 OF STATUTE.

"Sec. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word 'five,' where the same occurs in said section, and by inserting in lieu thereof the word 'ten;' and by striking out the word 'ten,' where the same occurs in said section, and by inserting in lieu thereof the word 'twenty.' And section seven of said act is hereby amended by striking out the word 'fifteen,' where the same occurs in said section, and inserting in lieu thereof the word 'twenty-five.' And the term 'mineral land,' wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. *And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre emption, homestead, swamp land,* OR OTHER LAWFUL CLAIM, nor include any Government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturalist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturalist, and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulation: *Provided, also*, That the phrase 'but where the same shall contain timber, the timber thereon is hereby granted to said company,' in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act, or in this

act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled 'An act donating lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts,' approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land office."

United States Statutes at Large, Vol. 13, page 356.

AN ACT TO QUIET LAND TITLES IN CALIFORNIA. (Approved July 23, 1866.)

SECTIONS 1, 2, AND 3 OF STATUTE.

Be it enacted, etc., "That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State: Provided, That no selection made by said State contrary to existing laws shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military, or Indian purposes by the United States, or to any mineral land, or to any land held or claimed under any valid Mexican or Spanish grant, or to any land which, at the time of the passage of this act, was included within the limits of any city, town, or village, or within the county of San Francisco: *And provided further,* that the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law.

"Sec. 2. *And be it further enacted, That where the selections named in section one of this act have been made upon land which has been surveyed by authority of the United States, it shall be the duty of the proper authorities of the State, where the same has not already been done, to notify the Register of the United States Land Office for the district in which the land is located of such selection, which notice shall be regarded as the date of the State selection,* and the Commissioner of the General Land Office shall, immediately after the passage of this act, instruct the several local Registers to forward to the General Land Office, after investigation and decision, all such selections, which, if found

to be in accordance with section one of this act, the Commissioner shall certify over to the State in the usual manner.

"Sec. 3. *And be it further enacted*, That where the selections named in section one of this act have been made from lands which have not been surveyed by authority of the United States, but which selections have been surveyed by authority of and under the laws of said State, and the land sold to purchasers in good faith under the laws of the State, such selections shall, from the date of the passage of this act, when marked off and designated in the field, have the same force and effect as the pre-emption rights of a settler upon unsurveyed public land; and if, upon survey of such lands by the United States, the lines of the two surveys shall be found not to agree, the selection shall be so changed as to include those legal sub-divisions which nearest conform to the identical land included in the State survey and selection. Upon the filing with the Register of the proper United States Land Office of the township plat in which any such selection of unsurveyed land is located, the holder of the State title shall be allowed the same time to present and prove up his purchase and claim under this act as is allowed pre-emptors under existing laws; and if found in accordance with section one of this act, the land embraced therein shall be certified over to the State by the Commissioner of the General Land Office."

United States Statutes at Large, vol. 14, page 218.

AN ACT RELATING TO INDEMNITY SCHOOL SELECTIONS IN THE STATE OF CALIFORNIA (Approved March 1, 1877).

Be it enacted, &c., "That the title to the lands certified to the State of California, known as indemnity school selections, which lands were selected in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said State, is hereby confirmed to said State in lieu of the sixteenth and thirty-sixth sections, for which the selections were made.

"Sec. 2. That where indemnity school selections have been made and certified to said State, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth and thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, That if there be no such sixteenth or thirty-

sixth section, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States.

"Sec. 3. That the foregoing confirmation shall not extend to the lands settled upon by any actual settler claiming the right to enter not exceeding the prescribed legal quantity under the homestead or preemption laws: *Provided*, That such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of said lands to the State of California by the Department of the Interior: *And provided further*, That the claim of such settler shall be presented to the register and receiver of the District Land Office, together with the proper proof of his settlement and residence, within twelve months after the passage of this act, under such rules and regulations as may be established by the Commissioner of the General Land Office.

"Sec. 4. That this act shall not apply to any mineral lands, nor to any lands in the City and County of San Francisco, nor to any incorporated city or town, nor to any tide, swamp, or overflowed lands."

United States Statutes at Large, Vol. 19, page 267.

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In the Supreme Court of the United States.

OCTOBER TERM, 1892.

HENRY CURTNER ET AL., APPELLANTS,
vs.
THE UNITED STATES.
No. 258.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEE.

F. H. WATERMAN,
A. T. BRITTON,
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Attorneys for Appellees.

CHARLES H. ALDRICH,
Solicitor-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

HENRY CURTNER ET AL., APPELLANTS,
vs.
THE UNITED STATES.
No. 258.

STATEMENT OF THE CASE.

This is a suit in equity brought by the United States, the appellee here, complainant in the court below, in the United States circuit court of the ninth circuit, district of California, at the instance of the Attorney-General, to set aside and vacate certain listings or conveyances of land to the State of California, described in the bill and averred to have been so listed wrongfully by inadvertence and mistake, said lands having been previously granted and appropriated to the Central Pacific Railroad Company of California by the acts of Congress of July 1, 1862, and July 2, 1864 (U. S. Stats., Vols. 12, 13, pp 489, 356).

On the other hand it is claimed by appellants, defendants and respondents in the court below, and purchasers

from the State, that said lands were rightfully so listed by authority of the act of Congress of March 3, 1853 (10 U. S. Stats., 244), granting to the State of California the sixteenth and thirty-sixth sections of public lands in each township in said State, or other land in lieu thereof, when such sections have been lost to the State, as mentioned in section 7 of that act. It is the selection and listing to the State of California of these so called "lieu lands" to which this suits relates.

It is also claimed by appellants that, if said selections and listings were invalid when made, yet that they were validated and made good by the remedial act of Congress of July 23, 1866, entitled "An act to quiet land titles in California" (U. S. Stats., Vol. 14, p. 218); but there is no averment in the answer, nor does the testimony show that the appellants are purchasers from the State of California in good faith, since it nowhere appears that these lands were selected and located under surveys made by authority of the State; hence they were not disposed of by the State "to purchasers in good faith under her laws," as provided in section 1 of that act. (For survey by State authority in such cases, see section 5 of the act of April 22, 1861, in the Appendix hereof.)

There is in the answer only an averment that these selections were made "in lieu of, and as indemnity for certain sixteenth and thirty-sixth sections of land or portions of such sections that had become lost to the State" (Rec., Vol. I, 29.) No loss of any particular sixteenth or thirty-sixth section or any portion thereof, nor the cause of the alleged loss, is shown by the answer, so as to bring

the listing within the provisions of section 7 of the act of 1853; nor is it averred that said selections were made "agreeably to the provisions of the act of Congress approved on the 20th day of May, 1826 * * * and subject to approval by the Secretary of the Interior," as is also required by said section 7, as construed by section 6 of the act of 1866; nor is it alleged in the answer (nor does it appear in the testimony) that these selections were made from surveyed lands within the same land district as the section for which the selection is made, or that the surveyor-general for the State of California ever furnished the lists required as the basis of selection, as is required by said section 6. The assertion of these necessary facts is an issuable assertion and may be denied; the facts being of a jurisdictional nature, they should have been pleaded definitely and circumstantially. The mere assertion of loss to the State is insufficient to bring that loss within the remedial provisions of said section 6. (*The Secretary* vs. *McGarrahan*, 9 *Wall.*, 310. *Aurrecoechea* vs. *Sinclair*, 60 *Cal.*, 532.)

Now, do the averments of the answer show compliance with the requirements of sections 7, 8 of the act of April 23, 1858, and of sections 1, 2, 3, 4, 5, 11, 12 of the act of April 22, 1861, of the laws of California, relative to lieu lands, in force at the dates of the alleged selections or locations? (Rec., Vol. I, 27–43, inc.; also see appendix.)

After argument and submission before Mr. Justice Field and Judge Sawyer a decree was entered in the court below in favor of complainant, from which respondents appealed.

PLEADINGS AND ISSUES.

The pleadings, viz, the amended bill as amended by amendments of June 14, 1885, and of January 3, 1887 (Rec., Vol. 1 to 21, inc., and 23, 39); the amended answer as amended by amendment to amended answer of January 6, 1887 (Rec., Vol. I, 27 to 37, inc., and 40 to 43, inc.); the replication to amended answer of February 1, 1887 (Rec., Vol. I., 44); and defendant's "admissions of allegations of amended bill" (Rec., Vol. I, 165–'67) show that all the averments of the bill in paragraphs 1, 2, 3, 4, 5, and paragraph 6, down to the words: "That said The Western Pacific Railway Company," in lines 15 and 16, on page 4 of Record, Vol. I, also paragraphs 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 26 are admitted to be true. The contentions arise from denials of the averments in paragraphs 6, 11, 21, 22, 23, 24, 25, 27, 28, 29, and seem to be substantially as follows, viz:

First. It is denied "that said, the Western Pacific Railroad Company, and its successor, the Central Pacific Railroad Company, did, within three years from the completion of said Central Pacific Railroad Company's road, sell and dispose of said lands described in the bill to persons other than the defendants" (Respondents), as alleged in paragraph 6.

Second. The averments of paragraph 11, other than that of filing the map designating the general route of the road, are denied, appellants claiming that the lands in contest were not affected by the order of withdrawal made by the Secretary of the Interior on December 23, 1864 (Rec., Vol. I, 167), for the reason that said lands had been

previously selected by the State of California and were listed over in part satisfaction of the grant to the State of the sixteenth and thirty-sixth sections of the public lands in each township or other lands in lieu thereof (Rec., Vol. I, 29–42).

Third. The contention raised by the denials of the averments of paragraph 21 relates to the identity of the lands in contest, as being a part of the lands affected by the Congressional grant of 1862–'64; and it is denied that the railroad company was entitled to patents therefor (Rec., Vol. I, 12–28).

Fourth. As to paragraphs 22, 23, and 24, the facts alleged are admitted to be true, by defendant's (respondents) "admission of allegations of amended bill", in paragraphs IV and V, thereof (Rec., Vol. I, 165–6). The averments of these paragraphs as to the performance of the conditions of the acts of 1862–'64, the description of the land in contest as to location and quantity, the dates of listing over and certification, are therein admitted to be true.

Fifth. Paragraph 25 relates to the action of the company by its agent, Charles J. Torbert, in making claim to the lands in contest, by presentation, to the register and receiver of the land office at San Francisco, of list No. 13; the essential facts asserted therein being admitted by defendants to be true (Rec., Vol. I, 166, 176, 177, 178).

Sixth. Paragraph 27, setting forth that the lands in contest were, at the respective times mentioned therein, subject to the rights of the railroad company under the act of July 1, 1862, is denied for the reason, as is claimed by respondents, that at certain dates prior to the month of

August, A. D. 1864, under and by virtue of the laws of the State of California, they had been selected and located out of lands of the United States under the act of Congress of March 3, 1853 (R., Vol. I, 29-41). There is no allegation in the answers that these lands so selected and located in township 2 S., R. 1 E. were surveyed lands at all prior to the dates of selection, nor does the record show any evidence of such survey; and of the lands in township 3 S., R. 3 E., only a survey in the field is alleged (R., Vol. 1, 41), and only on information and belief that the survey was ever filed and made a record in the local United States land office at San Francisco.

Seventh. Paragraph 28, setting forth the refusal of the President to issue, or cause to be issued to the railroad company patents for the lands in contest for the reasons therein asserted, and that appellants had notice of the grant of these lands to the railroad company, at all the times mentioned in the bill, is denied.

Eighth. Paragraph 29 shows the appeal proceedings taken by the railroad company from the decision of the register and receiver at San Francisco refusing to certify Torbert's list No. 13 to the Commissioner of the General Land Office at Washington, resulting in the affirmation, by the Commissioner and the Secretary, of the decision of the register and receiver, and in the direction by the Secretary, under the advice of the Attorney-General, after refusal by the State to relinquish the lands in contest (R., Vol. I, 188), that suits be commenced in the proper court to set aside the listings to the State of California of the lands in contest (R., Vol. I, 315–316, inc.) The facts alleged in that paragraph are admitted to be true (R.,

Vol. I, 166). The appellants, however, "deny that said William D. English or any other person did at any time appear in said proceedings before the Land Department, or file an appeal therein, or take any step, or do any act for or on behalf of these respondents, or any of them," as is averred in that paragraph (R., Vol. I, 32–33).

Ninth. Paragraph 30, averring demand upon the State of California for relinquishment to the United States of its title to lands in contest, and the neglect and refusal of the State to comply therewith is not denied, but proved by complainant's Exhibit N. (R., Vol. I, 188).

Tenth. Paragraph 31, averring diligence and continuity of efforts, by the company, in the Land Department, to have the errors and mistakes alleges in the bill corrected, is not denied.

The foregoing is a seemingly sufficient statement of the contentions shown by the pleadings, as we understand them to be.

THE DEMURRERS.

The amended bill as amended by the amendment filed June 14 was met by a demurrer (R., Vol. I, 24) on the grounds, *first*, that the bill generally does not show a case entitling complainant to the relief sought; *second*, that the bill shows that the complainant has no interest in the subject matter of the suit and no right to institute a suit; *third*, that there is a defect in parties' complainant, in that the grantees of the Central Pacific Railroad Company and the Western Pacific Railroad Company are not joined with complainant in the action; *fourth*, that the amended bill

is multifarious, in that there is an improper joinder of actions and misjoinder of parties defendant; *fifth*, that the action is barred by the statute of limitations of the code of California; *sixth*, that the State of California was not made a party to the suit; *seventh*, a want of sufficient particularity in the statement of the facts to support the averment of the bill that the lands mentioned in the bill had been listed to the State of California through error, inadvertance, and mistake.

ARGUMENT ON DEMURRER.

In response to the points raised by the demurrer we say, that the bill presents a proper case for this action, alleging as it does, a wrongful and illegal listing to the State, purporting to convey title, equivalent to a patent, of lands belonging to another, through inadvertance and mistake (*Polk* vs. *Wendell*, 9 Cranch, 98; *Hoofnagle* vs. *Anderson*, 7 Wheat., 214; *San Pedro and Cañon del Agua Co.* vs. *United States*, S. C. Reporter, Vol. 13, No. 4, January 2, 1893; *United States* vs. *Stone*, 2 Wall., 535; *Hughes* vs. *United States*, 4 Wall., 232–36; *Jackson* vs. *Lawton*, 10 Johnson, 24); and we further say that the complainant, the United States, is not a mere nominal party, but has every duty and interest to fulfill its obligation to the grantees in the Congressional act of July, 1862 and 1864 upon the performance of its conditions. Common honesty and good faith requires it. After years of endeavor before the Land Department (R., Vol. I, 16, 17, 18, 19, 20, 166) that Department finally decided that patents to the grantee under the acts of 1862 and 1864

could not be issued, for the reason that these lands had already been listed over to the State of California, and that the Department no longer had jurisdiction or control over them, although it was conceded that they were so listed wrongfully, and that they of right belonged to said grantee. This decision was accompanied by the instruction of the Secretary, to the Commissioner of the General Land Office, directing him to prepare the evidence necessary to the preparation of a bill in equity, in the name of the United States, to set aside these wrongful listings, followed by instructions of the Attorney-General to commence the suit. (R., Vol. I, 177–200, inc., 315, 316.)

The act of July 1, 1862, section 4, provides that upon the construction of 40 consecutive miles of any portion of said railroad "patents shall issue conveying the right and title to said lands to said company." These patents so conveying title also became the evidence of performance of the very acts which constituted the inducement and consideration of the grant, viz, the building of the road.

Patents, therefore, are indispensable to the full rights of the grantee, which having been refused by the land department, it became obligatory upon the Government to institute this proceeding, that the obstacles preventing their issuance may be removed. Of its duty and right so to do there can be no doubt. (*Mullan and another* vs. *United States*, 118 U. S., 271; *United States* vs. *Tin Co.*, 125 U. S., 273; *United States* vs. *Beebee*, 127 U. S., 338; *United States* vs. *Mo., K. and T. Ry. Co.*, 141 U. S., 358, 380; *Denny* vs. *Dodson*, 32 Fed. Rep., 899; *San Pedro*

and Cañon del Agua Co. vs. *United States*, S. C. Rep., vol. 13, No. 5, of January 9, 1893.) What less or else could the Government have done to keep its engagements than to institute proceedings to set aside the illegal and wrongful acts of its own servants? The Government of the United States has every interest to keep its engagements in good faith, and it holds such relation to its own citizens that it may not ignore its obligations to them. It could not refuse proper relief against its own wrong.

The Central Pacific Railroad Company and the Western Pacific Railroad Company are not necessary or proper parties to this proceeding.

The United States only could institute such an action, necessarily *ex parte*. The rights of those companies lie against the United States, and they must await such action as the United States may take to realize and vindicate those rights as against the alleged wrongful acts of its own officials. The appellants are in no way affected by the absence of those companies as parties complainant.

The bill is not subject to the charge of multifariousness in the respects charged, for the reason that equity ever favors the consolidation of rights of action into one suit especially in proceedings where there are common facts supporting the action and defense, respectively, and where the decree to be rendered will affect each defendant alike, as in this case. Besides, this proceeding does not attack the present possession of these lands, but relates only to a matter of alleged fundamental defects of title, common to all the parties respondent, who are in no manner prejudiced in their defense, but are individually and in the aggregate benefited by the consolidation of persons and

essentially common facts in a single action. (*Story Eq. Pl. sec.* 271, 530, 539, 540; *Daniell Chanc.* Pl. P. vol. 1, 334, *et seq.; Pomeroy Eq. Juris.*, vol. 1, sec. IV, pp. 254-300, inc., especially *sec.* 255, fourth class; *Merchants' Nat. Bank* vs. *Hogle*, 25 Ill., 543; *People* vs. *Morrill*, 26 Cal., 360-'61; *Wilson* vs. *Castro*, 31 *id.*, 426-432, inc.; *Moore* vs. *Massini*, 32 *Id.*, 595.)

The statute of limitations does not run against the United States. (*United States* vs. *Kirkpatrick*, 9 Wheat., 720; *Smith* vs. *The United States*, 5 Pet., 291; *United States* vs. *Throckmorton*, 8 Otto, 64; *United States* vs. *Williams*, 5 McLean, 133; *United States* vs. *Beebe*, 4 McCrary, 12; *Stoughton* vs. *Baker*, 4 Mass., 521; *State Commissioner* vs. *Stone*, 28 Miss., 763; *Parks* vs. *The State*, 7 Mo.) Lapse of time such as implies inexcusable neglect in asserting a right of action, amounting to staleness, can only be pleaded in bar of an action in equity by the United States. The bill avers and the record shows continued and due diligence in asserting the rights of the parties in interest before that Department, the Department of the Interior, where only could those rights be first considered and passed upon. The averments of paragraph 31 of the bill relative thereto are not denied and the appellants' admission of the truth of the facts set forth in paragraphs 25 and 29, in effect, admits the truth of paragraph 31 by admitting the acts which show the diligence (R., Vol. I, 17, 18, 19, 166). It was after the final adverse determination by the Department of the application of the company for patents, for want of power, that this action was, at the request of the Secretary of the Interior, commenced and is now prosecuted (R., Vol. I, 315, 316).

There is in the bill ample particularity of statement of facts to support the averment that the lands had been wrongfully listed to the State through error, inadvertence, and mistake. The bill first avers every essential fact, and the performance of every condition necessary to entitle the railroad company to receive patents for the lands in contest, and shows that the right thereto accrued before the alleged unlawful listings to the State (R., Vol. I, 7–13, inc.); it then avers the due presentation of its demand therefor, through its agent, Torbert, with all circumstance and particularity, and the refusal of the Department to issue patents as requested, for the reason that these lands had already been listed over to the State of California R., Vol. I, 14–20, inc.). These considerations apply equally to the first and to the seventh grounds of demurrer to the amended bill (R., Vol. I, 24, 25). The facts pleaded fully sustain the averments and conclusion, that said lands were so listed over wrongfully through error, inadvertence, and mistake.

The sixth point of demurrer, viz, "that it appears on the face of the bill that the State of California is a necessary party to the suit," is not sustained by the record, but, on the contrary, the bill clearly shows that at the date of its filing the State of California had parted with all its interest in these lands, if any she ever had. Indeed the appellants aver in the amended answer that the State had parted with its title before the commencement of this action (R., Vol. 1, 33), and so was not a proper or necessary party. The bill does not show that the State, at most, was at any time, or could be in any case, more than a mere

means of transmission of title from the United States to purchasers, whereby the State might receive the purchase money of the lands, as a beneficence under the act of 1853; that beneficence having been realized in the sale of the lands, the State certainly had no further interest. The laws of California so provide, and the testimony shows (Rec., Vol. I, 245, 246, 247, and 260 to 265 inclusive) that the selections were made by the State locating agent, at the instance of the respective purchasers. Respondents can not now say that they did not then take such title, if any, as the State then had.

If the State of California has any latent or consequential interest in this proceeding, or in the lands purporting to have been sold and conveyed by her, it should have been made to appear by a special plea, or by the answer, or possibly by the demurrer itself, although such a demurrer might have been objectionable as being what is called a "speaking demurrer," by which it is sought to introduce new matter in support of the demurrer, but not appearing on the face of the bill (*Barb. Chanc.*, Vol. I, 107, 2d ed.). However that may be, certainly such an assertion of fact should have been made in a manner that it might be denied, as it undeniably would be issuable. Section 590 of the Code of Civil Procedure of California under which the pleadings here were had, reads as follows:

> An issue of fact arises, (1) upon the material allegation in the complaint controverted by the answer, and (2) upon new matter in the answer, except an issue of law is joined thereon.

It seems very clear that the interest of the State of California, if any, should have been pleaded; it is not contended that all parties having real and material interests in the matters set forth in the bill may not be made parties. But it is equally clear and true that persons having only consequential interests in the matter such as may be indirectly affected by the decree prayed for, and growing out of the obligations or transactions between themselves and others, are not necessary or proper parties; certainly not until such interests are in some manner brought within the purview of the court; which could properly be done only by a special plea or answer. (*Story's Eq. Plead'gs*, sec. 237, a, b, sec. 238. (*Barb. Chanc. Prac.*, Vol. I, 115; *Daniell's Chanc.* P. & P., Vol. I, 600, 602–603; *Pavisich* vs. *Bean*, 48 Cal., 364; *Birdsong* vs. *Birdsong*, 2 Head, 302; *Webster* vs. *French*, 11 Ill., 254; *Merrit* vs. *Walsh*, 32 N. Y., 685.) The provisions of the code of New York, relating to demurrers, under which the decision in the latter case was made, are to the same effect as those of California, and that decision sustains our contention upon the point under consideration, viz, that the facts tending to show an interest of the State not appearing on the face of the bill should somehow have been set forth in the pleadings.

Lord Eldon in *Cockburn* vs. *Thompson* (16 Ves., 325, 1809) says:

> The strict rule is that all persons materially interested in the subject of the suit, however numerous, ought to be parties, that there may be a complete decree between all parties having material interests.

But Lord Redesdale says:

> In many cases the expression that all parties interested in the subject must be parties to a suit, is not to be understood as extending to all persons who may be consequentially interested. (Red. Pl., 170.)

The case at bar is not an exception to the rule as laid down by Lord Redesdale, but is strictly within it. There is no material interest, or any interest of the State shown by the bill. If the State has any interest whatever, it must be a consequential interest, and so should have been pleaded by appellants.

The United States in this proceeding is seeking to correct its own wrong to others in its own and proper way; it seeks no relief or title from the State, and is not interested in any obligations which may have been created by the sale of lands to purchasers by the State, to which the State had no title; nor can the United States be at all constrained by them. As well might the plaintiff in an action in ejectment be asked to implead the guarantor in a deed of warranty under which the defendant got into alleged wrongful possession, as that the State be made a party here. The bill avers that the listings to the State of California of these lands in contest, by the Commissioner were wrongful, made "without right and through error, inadvertance, and mistake." The listings if so made were void and the State took no title. These averments of the bill, on demurrer, must be taken as true; they can only be put in issue by plea or answer, not by assertion in a brief or argument.

The Code of Civil Procedure of California, section 431, reads:

> The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so it may be disregarded.

The objection to the bill under consideration is that the State was not made a party, but the grounds of that objection are not specified; no State interest of any kind is alleged. It follows that the objection of the demurrer must be disregarded, there being no specified grounds to support it. The same result would follow, even had the grounds of the objection been fully specified, if it appeared that those grounds were not warranted by the averments of the bill.

If any latent or consequential interest of the State had been disclosed by the pleadings the bill would undoubtedly have been amended and the State of California made a party.

It would now be unjust that the appellants should take advantage from their own neglect.

No right or interest of the State in these lands, or of the respondents from or through the State, could have been asserted by the State, if a party, which does not now appear in the contentions shown by the pleadings, and which are not now under the consideration of the court. If this court shall find that the listings to the State by the commissioner were lawful, it is well for the appellants; if, on the other hand, that the listings were unlawful and void, then the State of California took no interest, and certainly would not be a proper party. In either case it is immaterial; neither the appellants nor the State

can suffer by the omission. Courts of equity will not sustain demurrers for technical and immaterial errors affecting adversely the interests of no one.

There was also a demurrer to the amended bill filed on January 6, 1885, prior to the last demurrer to the amended bill as amended (R, Vol. I, 21, 22, 23), which needs no consideration other than that the assertions of paragraphs A and B thereof are not true.

It does not appear upon the face of the amended bill that "said action is prosecuted solely and only on behalf and in the interest of the Central Pacific Railroad Company or its grantees," or "that the United States is not the real party in interest," and "that this action is prosecuted solely on behalf of and in the interest of certain supposed private persons," as is in that demurrer alleged. There is nothing in the bill that shows that this proceeding was begun or is now prosecuted in any other interest or for any other purpose than that the United States may be enabled to keep its good faith and engagements pledged in the acts of its Congress in 1862 and 1864. It may be stated and admitted, however, if of any interest, that there are private persons, including a widow and infants, who are consequentially interested in the maintenance of that good faith and those engagements involved in this proceeding. The other matters in that demurrer being substantially the same as already discussed, need no further consideration.

The opinion of Judge Sawyer, overruling the demurrers, does not appear in the records here, not being found

on file in the clerk's office, seemingly for the reason that, after printing, the filing was forgotten. It appears in 11 Saw., 411.

ARGUMENT ON THE ISSUES.

We now turn to the consideration of the issues and contentions, in the order of their previous designation herein.

I.

In support of complainant's contention in the first issue, complainant relies upon the stipulation omitting from the record Exhibits S, T, U (R., Vol. I, 330), which it is agreed establish the disposition of the lands in contest long before the limit of time fixed by the act of Congress of July 2, 1862.

II.

In support of complainant's contention in the second issue, see complainant's Exhibits A, C (R., Vol. I, 165–167), B, D (Vol. II), and appellant's answer as amended, wherein the filing, by the railroad company, of the map of the general route on December 8, 1864, and also the map of definite and final location of the line of road on February 1, 1870, is admitted (R., Vol. I, 40, 43, 61, 62, 325; Vol. II, Resp. Ex. 47).

III.

In support of the third contention arising from the averments of paragraph 21 of the bill, complainant relies upon the fact that these lands are all within the limits of 10 miles from the line of the road fixed by section 3 of the act of July 1, 1862, and were odd-numbered sections,

as shown by the several maps in evidence and admitted by the respondents, and, upon the admitted facts of performance by the company of all conditions required by the act of 1862–'64 (R., Vol. I, 165), and that the State selections or locations of these lands, prior to the filing of the map of the general route of the road on December 8, 1864, were null and void, for the reason that said selections were made of "unsurveyed lands."

IV.

As to the fourth contention, arising from averments in paragraphs 22, 23, and 24 of the bill, and the partial admissions and denials in appellants' answers, and "admissions of allegations of amended bill" (Rec., Vol. 1, 165), complainant's counsel say that the admitted facts of performance of all the requirements of the act, if the State locations and listings were null and void, fully warrant the conclusions of those sections, viz, that the railroad company was lawfully entitled to have and receive patents from the United States to these lands, as averred in paragraph 23, and that the "Commissioner of the General Land Office did, * * * without right and through error, * * * wrongfully list * * * to the State of California the said above-described lands," etc., as alleged in paragraph 24.

V.

As to the fifth contention, arising from paragraph 25, the facts alleged in that paragraph are fully admitted to be true by appellants' "admission of allegations of amended bill" (Rec., Vol. 1, 166).

VI.

As to the sixth issue, arising from the denial of the allegations in paragraph 27 of the bill, the evidence shows that the allegations of that paragraph are true, and are not denied, except for the reason of the pretended selections and listings to the State, which are asserted by complainant to have been null and void when made.

VII.

As to the seventh contention, arising from the allegations of paragraph 28, the facts alleged are not denied, except so far as the allegations assert the reason why the "President refused," etc., to be "solely because said lands had previously been, by mistake, wrongfully and inadvertently listed to the State of California" (Rec., Vol. I, 28, 29, 32). The averment of notice to appellants in paragraph 28 and denied by appellants (Rec., Vol. I, 32) we do not think needs discussion. The grant to the railroad company being a public act, appearing in the public statutes and in the records and documents on file in the United States land offices at Washington and San Francisco, each and all, were notice to appellants that these lands were not subject to State selection or listing over to the State. There was written on the face of both the official maps or plats of survey of the townships in which the lands in contest are situated, on file in the register's office, in red ink, distinct notice that the odd sections of land shown thereon had been granted to the Western Pacific Railroad Company and referring to the Commissioner's letter of withdrawal of December 23, 1864 (R., Vol. I, 200–260).

VIII.

In support of the averments of the amended bill found in paragraph 29, the eighth contention, relating to the proceedings had in the land office, the facts alleged therein are generally admitted to be true (R., Vol. I, 166). It appears in the testimony that one William D. English, an attorney for appellants, did appear and prosecute an appeal in their behalf for review of the decision of the Commissioner of the General Land Office, as alleged in that paragraph (R., Vol. I, 17, 18), although denied by appellants (R., Vol. I, 32–33). Complainant refers to the letter of said William D. English to the Commissioner of the General Land Office, dated May 25, 1878 (R., Vol. I, 65), appealing from the decision of the Commissioner of March 9, 1878 (R., Vol. I, 181–186, inc.), which decision was affirmed, on appeal, by the Secretary of the Interior, Schurz, on January 15, 1878 (R., Vol. I, 190). That decision of the Commissioner found that the lands in contest here were outside the limits of the Las Positas grant and reservation, and so, being odd-numbered sections, inured to the railroad company, and that these State selections, being of unsurveyed lands, were void, and also that the act of July 23, 1866, did not confirm or validate them, but that the right of the railroad company vested in them at the withdrawal of December 23, 1864. There was the same ruling in the Townsend case (Rec., Vol. I, 191–198, inc.). We claim that that decision in those cases by the Land Department, concerning a question of fact, or of mixed law and fact, affecting the Government lands,

whether within or without the bounds of reservation, was final; it is *res adjudicata*. These appellants, having appeared in the proceedings had, are bound by them.

IX.

The matters next claiming attention seem to be, viz:

First. The nature and effect of the congressional acts of 1862–1864, and the executive withdrawal thereunder from sale, location, etc., on December 23, 1864 (R., Vol. I, 167).

Second. The act of March 3, 1853, sections 6, 7, the right of the State of California thereunder to the sixteenth and thirty-sixth sections of public lands in each township, and to lands in lieu thereof, as affected by the necessity of governmental survey prior to selection, and the exceptions, requirements, and limitations of the act itself.

Third. The curative or remedial act of July 23, 1866, and its effect, if any, upon these alleged void selections and listings to the State.

X.

Complainant says that said lands had, previous to the selections and listings to the State, been granted to the Central Pacific Railroad Company of California, its successors and assigns, by the act of Congress of July 1, 1862 (Stat. L., Vol. 12, p. 489), and acts amendatory thereof; and that, at the dates of the alleged respective selections, location, at listings, said lands had already been appropriated to aid in the construction of said company's road, and were, at the respective dates of said selections and

listings to the State, held by grant and appropriation in reservation to answer the calls of said Congressional grant, and that the rights of said railroad company had thereby attached to the various parcels of land mentioned in the bill in such manner as that said alleged selections were null and void, having been made of lands already appropriated, granted, and reserved, and also, for the reason that said lands were unsurveyed lands at the date of selection, so that the rights of the railroad company under the act of July 1, 1862, intervened and attached to said lands prior to the curative act of Congress of July 23, 1866.

XI.

The act of Congress of July 1, 1862, is a legislative grant of land, *in presenti*, to the Union Pacific Railroad Company and to the Central Pacific Railroad Company of California, and vested in said companies an immediate interest in the land granted, which became definite and specific upon the filing of the map of the general route fixing the line of the road and survey of the lands by the United States, so that the rights granted thereby to the latter company attached to the land in contest prior to any legal selections or listing of the same to the State.

Section 7 of said act reads as follows, viz:

> *Provided*, That within two years after the passage of this act said company shall designate the general route of said road as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from preëmption, private entry, and sale, etc.

The testimony shows that the company, in compliance with the provisions of said section 7, on the 8th day of December, 1864, filed in the General Land Office of the Department of the Interior its map designating the general route. (See complainant's Exhibit B, R., Vol. II and Vol. I., 27, 40, 61, 167.) That thereupon the Secretary of the Interior, by the Commissioner of the General Land Office, did, on the 23d day of December, 1864, as provided in said section 7, issue and record in his office at Washington an order of withdrawal of the odd-numbered sections of land within 25 miles of the line of the road from sale, location, preëmption, and homestead (R., Vol. I, 167), the extent of the withdrawal having been enlarged by the amendatory act of July 2, 1864, which order, and the map accompanying showing the lands withdrawn, was received in the local land office at San Francisco on January 30, 1865. (R., Vol. I, 62, Stipulation, Vol. II, Ex. D.)

It was admitted at the trial below (R., Vol. I, 61, 62) that a copy of this map was also filed in the office of the secretary of state for the State of California, on January 10, 1865, and in the office of the county clerk of Alameda County, in which county the lands in question are situated, on January 12, 1865. Whereupon the sections of land, designated by odd numbers, on the subsequent survey by the United States, within 25 miles of the line of the road, including the land in contest, on the said 8th day of December, or on the 23d day of the same month (being the respective days of filing said map and of issuing said order in the General Land Office at Washington),

or on January 30, 1865 (the date of reception and filing thereof in the local land office at San Francisco), if not earlier even, on July 1, 1862 (the date of the Congressional act), became appropriated and reserved, and in terms withdrawn "from sale, location, preëmption, and homestead." This map of the general route, for the purposes of this action, affecting the lands in contest, should, we think, be considered to be the map of the definite fixing of the line of the road, as well as of the general route. Certainly it was definite to the extent of affording the fixed limits within which the railroad company might obtain title to land. Judge Sawyer in the court below, in this case, considered the map of February 1, 1870 (R., Vol. I, 51, Vol. II, Resp. Ex. No. 47 being No. 15 in order) to be the map of the definite location, and such it undoubtedly was, as fixing the line of the road as constructed within the limits of the withdrawal; but the map of the general route of December 8, 1864, was none the less definite in fixing the limits within which the railroad company might, upon performance of the conditions of the grant, obtain an indefeasible title to the odd-numbered sections of land, and was also definite in fixing the date when the rights of the company attached to the land. What other purpose or effect can have been contemplated, or can be ascribed to it? (*Walden* vs. *Knevals*, 106 U. S., 360; *Kansas Pacific Railway Company* vs. *Dunmeyer*, 113 U. S., 629.)

It will be noticed that the acts of July, 1862–'64, did not in terms provide for a map of the definite fixing of the line of the road, and yet some map showing the defi-

nite fixing or location of the road, within the limits mentioned in these acts and in the order of withdrawal (R., Vol. I, 167), became indispensable to the adjustment of the claims of the company. The map of February 1, 1870, seems to answer that requirement; in was so considered and treated, both by the company and the Land Department, as the record shows. (R., Vol. I, 325; Vol. II, Ex. 47, No. 15 in order.)

The company undoubtedly had the right to build the road anywhere within the 20-mile limits of withdrawal; that numerous minor changes of location were required and made within those limits up to the date of the filing of the maps, showing the actual construction and final and definite fixing of the line of the road on February 1, 1870, is well known and may be admitted. It was undoubtedly to accommodate this usual necessity in railroad building that the limits of withdrawal were made double the limits of grant; and it becomes evident why neither the act of 1862 nor the act of 1864 provides for a map showing the definite fixing of the line of the road before its actual construction; such a map could not have been made; changes might have been desirable or necessary at the last moment possible.

XII.

We therefore say that under and by force of the said Congressional acts, the filing of the required map of December 8, 1864, and the order of withdrawal on the 23d of the same month, the odd-numbered sections of land within the limits of those acts not in terms excepted from their operation, became appropriated and reserved

to the railroad companies therein mentioned, for the governmental purpose expressed in section 3 of the act of July 1, 1862, needing only survey by the United States to make the appropriation, reservation, and grant definite and specific; and that such appropriation and reservation continued until such survey had been made, and the conditions of the grant had been performed by the grantee companies, when the title to said sections definitely vested in them; or until such a time as, by failure to perform those conditions, the grant might have lapsed, and the lands by governmental action had again become public lands and disposable by the Government; but that until such action by Congress, they were inaccessible and not disposable to the State of California, or to any other than the grantee in the acts of July, 1862–'64. (*Rutherford* vs. *Greene's Heirs*, 2 Wheat., 196; *Wilcox* vs. *Jackson*, 13 Pet., 498; *Schulenburg* vs. *Harriman*, 21 Wall., 44; *Mo., etc., Rwy. Co.* vs. *Kan. Pac. Rwy. Co.*, 97 U. S., 491; *Van Wyck* vs. *Knevals*, 106 U. S., 360; *Buttz* vs. *N. P. R. R. Co.*, 119 U. S., 55; *Denny* vs. *Doddson*, 32 Fed. Rep., 899, Circ. Court, D. Oregon; *Walden* vs. *Knevals*, 114 U. S. R., 373; *S. P. R. Co.* vs. *Orton*, 6 Saw., 198.)

In *Wilcox* vs. *Jackson*, before mentioned, the court says:

> But we go further and say, that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public land, and no subsequent law or proclamation or sale would be construed to embrace it or operate upon it, although no reservation were made of it.

(Also *Leavenworth Law. and Gal. R. Co.* vs. *United States*, 92 U. S., 733; *United States* vs. *Fitsgerald*, 15 Pet., 416; *Reighert* vs. *Felps*, 6 Wal., 160; *Best* vs. *Polk*, 18 Wal., 117; *Morton* vs. *Nebraska*, 21 Wal., 660; *Wolsey* vs. *Chapman*, 101 U. S., 769, 770; *Tartar* vs. *Spring Creek W. and M. Co.*, 5 Cal., 396; *Secretary Schurz, in Townsend Case* (R., Vol. 1, 197, 198); *Attorney-General Black*, 9 Opinions, 253; *Attorney-General Bates*, 11 Opinions, 59.

Indeed, the alienation of the public lands usually proceeds upon this practice and theory of appropriation, previous to absolute title. Homestead and preëmption claimants are protected, as against third parties, during the period of performance of the conditions of the homestead and preëmption acts, after the initial step.

XIII.

But, admitting for argument's sake the possibility that Congress might, in violation of good faith, have passed an act specifically conveying these lands to other parties than the grantees of the acts of 1862–'64, during the period given for the performance of the conditions, we say that Congress passed no such act, nor was there any existing law allowing title to be made, by or to other parties, of these lands so already appropriated and granted upon conditions subsequent, during the period of time allowed by the act for the performance of these conditions.

The right of the State of California to acquire public land under the act of March 3, 1853, section 6, could not be asserted upon lands already appropriated and granted,

or upon unsurveyed lands, or lands claimed under any foreign grant or title, or mineral lands, and so therefore reserved. (*Mullan and another* vs. *United States*, 118 U. S., 271; *United States* vs. *Stone*, 2 Wall., 525–535; *McLaughlin* vs. *United States*, 107 U. S., 526; *Western Pac. R. R. Co.* vs. *United States*, 108 U. S., 510; *United States* vs. *Curtner*, R., Vol. I, 58).

XIV.

Title by the State to lieu school lands could only be acquired by the existence of certain antecedent facts, viz, the loss to the State of the sixteenth and thirty-sixth sections in place, as appears by the provisions of section 7 of that act.

Nor could the right of the State attach to the land selected, as against the United States, until the specific land had been listed over to the State. Until the listing over the United States does not lose its control or power of disposal over such lands. The right of a locator upon Government land under the State of California, before listing over, can not be greater than that of a preëmptor before payment under the United States.

XV.

It will be conceded that the public lands which the act of March 3, 1853, only granted were such portions of the national domain as had not been already appropriated, reserved, or claimed, or in some manner otherwise disposed of, and had been surveyed by the United States.

It will be noticed that these lands in contest were claimed under a foreign grant and title long before the alleged

State selections, and also had been theretofore appropriated and granted to the railroad company, by a special legislative grant, for consideration of benefits to be received by the United States; not at the request of the grantee (sec. 3, act of July 1, 1862), but they were granted "*ex speciali gratia certa scientia, et mero motu regis.*" Such grants will be liberally construed in favor of the grantees. (See Blackstone, 2 Com., 347; Judge Story's opinion in *Charles River Bridge* vs. *Warren Bridge, et al.*, 11 Pet., 589, and cases therein cited; also *Fletcher* vs. *Peck*, 6 Cranch, 87; *The State of New Jersey* vs. *Wilson*, 7 Cranch, 164; *Terret* vs. *Taylor*, 9 Cranch, 43; *Rutherford* vs. *Greene's Heirs*, 2 Wheat., 196, *et seq.*; *Dartmouth College* vs. *Woodward*, 4 Wheat., 518; *United States* vs. *Fitzgerald*, 15 Pet., 407; *United States* vs. *Brooks*, 10 How., 459; *Leissure* vs. *Price*, 12 How., 59; *Langdeau* vs. *Hanes*, 21 Wal., 521.)

In *Fletcher* vs. *Peck*, the first and leading case, it is held that a legislative grant is an executed contract and as such is within the clause of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts. (*Kent*, Vol. 1, 412 *et seq.*, 5 ed., 1844, and cases there cited; *Summers* vs. *Dickenson*, 9 Cal., 554; *Hyman* vs. *Reed*, 13 *Id.*, 445, and cases cited; *Grogan* vs. *San Francisco*, 18 *Id.*, 613; *Megerle* vs. *Ashe*, 27 *Id.*, 327; *Kiernan* vs. *Griffith*, *Id.*, 89; *Higgins* vs. *Houghton*, 25 *Id.*, 252; *Benson* vs. *The Mayor of New York*, 10 Barb., 245.)

These lands in contest here have been earned by performance of the conditions of the grant as is conceded (Rec., Vol. 1, 165).

Courts, in such cases, will give effect to and realize the purpose and intention of the grant, and do equity if it can be done without violation of settled principles of law.

We do not say that the rights of the railroad company at the date of the Congressional grant attached to the land and became final and complete in the same and full sense that they did when the road had been constructed and the map of definite location of the line of the road had been filed, or that an absolute and indefeasible title passed at the date of that grant; but we do say that these lands, by force of the Congressional grant of 1862, then became appropriated and reserved to the use of the railroad company, awaiting only the filing of the township plats of survey, and the performance of the conditions of the grant, the building of the road, and the filing of the map of the definite fixing of the line of the road, to make the rights of the company to title and patent absolute; and that the rights of the company by appropriation attached to these lands before their survey and alleged selection by the State, and long before the remedial act of 1866.

XVI.

In the recent decision in *United States* vs. *Southern Pacific Railway Company* (S. C. Rep., Vol. 13, No. 6, p. 152), the contention that the act of 1862 created an appropriation and reservation of the lands in contest as against any other disposition seems to be fully upheld. The court says "that it is to be regarded as though title passes of the date of the act," not that the title did pass

but it is to be *regarded as though* title passes of that date, that is to say, substantially the same effect follows.

The words of grant in section 3 of the act of 1862 are words of a present grant, but they will be considered in connection with the words of the next section, 4, which provide that "whenever said company shall have completed forty consecutive miles * * * patents shall issue conveying the right and title to said company."

In *Platt* vs. *Union Pacific Railroad Company* (99 U. S., 48, 62), where these very sections of the act of 1862 were considered, this court said:

> Moreover, under the provisions of the act the title to the land could be perfected in the company only as the work of construction advanced; that is, as each section of 40 miles was completed.

The act of 1862 did not convey absolute title at its date, but it did create and convey an absolute right to title upon the building of the road; to secure that right, appropriation and reservation of the lands granted became the fit and necessary concomitant.

The act of 1862–'64, being a Congressional grant employing the terms of a present grant, took immediate effect, and cut off all later intermediate claims, excepting only from its operation reservations made by the act itself, and so antedates all subsequent efforts to beget title in the State.

A Congressional grant of itself necessarily works an immediate appropriation and reservation of the lands granted; such lands are no longer public lands subject to disposal under general laws; otherwise a Congressional grant of any portion of the national domain made to take

effect upon performance of subsequent acts mentioned might be deceptive and ruinous to one relying upon it and import bad faith in the Government. (*Rutherford* vs. *Greene's Heirs*, 2 Wheat., 196, before cited; *Leissure* vs. *Price*, 12 How., 76; *Schulenberg* vs. *Harriman*, 21 Wal., 44; *Mo. Kan. & Tex. R'y Co.* vs. *Kan. Pac. R'y Co.*, 97 U. S., 496–497–8–9; *Ryan* vs. *Railroad Co.*, 99 U. S., 382; *Grinnell* vs. *Railroad Co.*, 103 U. S., 739; *Van Wyck* vs. *Knevals*, 106 U. S., 365; *Leav. Law. and Gal. R'y Co.* vs. *United States*, 92 U. S., 733; *St. Paul & Sioux City R'y Co.* vs. *Winona & St. Peter R'y. Co.*, 112 U. S., 726; *Walden* vs. *Knevals*, 114 U. S., 373; *Sioux City & St. Paul, etc., R'y Co.*, vs. *Chicago and Milwaukee, etc., R'y Co.*, 117 U. S., 406; *Denny* vs. *Doddson*, 32 Fed. Rep., 899; *So. Pac. R'y Co.* vs. *Dall*, 10 Saw., 506; *Owens* vs. *Jackson*, 9 Cal., 322; *Doll* vs. *Meador*, 16 *Id.*, 315; *Higgins* vs. *Houghton*, 25 *Id.*, 254–5; *Robinson* vs. *Forest*, 29 *Id.*, 319; *McLaughlin* vs. *Menotti*, 89 *Id.*, 354; *United States* vs. *Southern Pac. R'y Company*, S. C. Reporter, Vol. 13, No. 6, p. 152, before mentioned.)

We ask attention to the language of this court in *Missouri, Kansas and Texas Railway Company* vs. *Kansas Pacific Railway Company*, above cited, where this same act of July 1, 1862, was under consideration, and where our contentions on the points under discussion seem to be fully sustained.

It was just and reasonable that pending the construction of the road no right to these odd-numbered sections, other than that of the grantee company, could be acquired.

XVII.

The order of events affecting these lands in Township 2 south, 1 east, was as follows, viz, the filing of the map of the general route in the Department of the Interior, December 8, 1864; the order of withdrawal of December 23, 1864, and the filing of the same in the local land office at San Francisco, January 30, 1865; the filing in the office of the register and receiver at San Francisco of the plat of survey of that township, June 10, 1865. (R., Vol. I, 61, 62, 167; Ex. B., Vol. II; Ex. V., Vol. II), and the filing of the map of the definite fixing of the line of the road, February 1, 1870 (R., Vol. I, Ex. 47; Vol. II, 43, Am. to Am. Ans.)

In the case of Township 3 south, 3 east, the facts differ from those in the above Township 1 south only as to the date of filing the map or plat of survey thereof in the local land office at San Francisco.

There are five maps or plats in the record purporting to show the survey of the Township 3 south, 3 east, viz, Complainant's Exhibit W. (R., Vol. I, 69; Vol. II, No. 4, in order), and Respondent's Exhibits Nos. 1, 9, 25, 26. (R., Vol. II, Nos. 9, 10, 11, 12, in order.) Complainant's Exhibit W shows that it was filed in the register's office on June 4, 1869, but was suspended on the same day, and suspension removed on January 29, 1870, from all the lands in the township, except sections 6 and 7, seemingly for the reason appearing on other and later maps, viz, that these sections were claimed to be a part of the Las Pocitas Rancho then under final survey. The contentions about that survey do not seem to have been

finally determined until as late as June 26, 1879, the date of the affirmation by Secretary Schurz of the decision of the Commissioner of March 9, 1878, on the appeal taken therefrom by W. D. English, on May 25, 1878 (R., Vol. I, 65, and 181–191, inclusive); also see the Secretary's decision of January 15, 1878, in the Townsend Case (*Id.*, 192–198, inclusive), where there was the same contention as to the true boundaries of the land claimed to have been granted under the name Las Pocitas, all long after the latest listings to the State by the Commissioner, in March, 1873. (R., Vol. I, 176.) Up to June 26, 1879, the matter was still *sub judice*.

See also Respondent's Exhibit 29, being the Dyer survey of 1865 (No. 13 in order), showing part of that township to be covered by the Las Pocitas; also Complainant's Exhibit F F, "compiled map," and Appellant's "Exhibit Hopkins" (R. Vol. II., No. 16, in order), all showing the same fact of impossibility of an earlier correct survey of that township.

The uncertainties relating to the extent of the Las Pocitas Rancho at that time, as indicated by those maps and by the correspondence in reference to its survey (R., Vol. I, 299–305, inclusive), evidently forbade correct and completed survey of this township until the final determination of the limits of that Mexican rancho grant. That determination is shown by Secretary Schurz's affirmation on June 29, 1879, above mentioned (R., Vol. I, 190, 191), of Dyer's last survey of the two leagues granted, shown here on Complainant's Exhibit F F, "Compiled Map," and Appellant's "Exhibit Hopkins" (R., Vol. II, the 7th and 17th in order).

The map of survey of Township 3 south, 3 east, showing the portion of it included in the final survey of that grant by the United States surveyor-general of California, was transmitted to and filed in the office of the register at San Francisco, as required by law, on July 1, 1871, soon after affirmation by the Secretary, on June 6, of the final survey of Las Pocitas (R., Vol. I, 259, Drummond's letter to Hardenburgh), as shown by the filing on the face of the map itself July 1, 1871, Exhibit 26. (R., Vol. II, No. 12 in order.) This map was seemingly the first complete and official map of survey of that township possible to have been made or filed.

Whether this map with its date of filing in the register's office, July 1, 1871, as held in *Aurrecoechea* vs. *Sinclair* (60 Cal., 543, or map, Comp. Ex. W, R., Vol. II, No. 4, in order) showing filing and suspension on the same day, June 4, 1869, as held by Judge Sawyer in this case and also by Secretary Schurz in the Townsend Case (R. Vol. I, 195), is to be considered as the date of the survey of this township, is quite unimportant. It will be noticed, however, that the letter of Commissioner Drummond to the register and receiver at San Francisco of June 14, 1871 (R., Vol. I, 258), removing the suspension from lands outside of the final survey of the Las Pocitas Rancho did not, in terms, at least, restore this survey map of this township (Ex. W), previously suspended on June 4, 1869, for the seeming reason that it was not correct, as it did not correctly show the portion of the Las Pocitas Rancho, found within that township, appearing on the plat of final survey of July 1, 1871 (Ex., 26, above men-

tioned). In *Durand* vs. *Martin* (120 U. S., 367, 368), and in *Aurrecoechea* vs. *Bangs* (114 U. S., 382), it was held that the final survey of Las Pocitas was made in 1871. There could have been no earlier correct or final survey of this township, and owing to the contentions about its correctness, it remained *sub judice* in the Department until June, 1879, as above shown.

It is immaterial which of these dates of survey be fixed upon. Both were long after the date of the State selections. The other maps shown in the transcript need no consideration, as they never became operative upon the lands in contest by promulgation in the register's office; their existence in the archives of the surveyor-general's office can have no effect or significance; they are only evidence of imperfect and discarded surveys in the field.

If the grant of 1862–'64 itself did not, by appropriation, reserve these lands, then surely the order of withdrawal protected them until future survey, of whatever date, and until the filing of the map of the definite fixing of the line of the road, when the rights of the company became indefeasible, except by act of Congress, upon nonconstruction of the road (*Schulenberg* vs. *Harriman*, 21 Wal., 44).

Upon the subsequent filing of the map of the definite fixing of the line of the road on February 1, 1870 (R., Vol. I, 43, Ex. 47, Vol. II, No. 15, in order), the right of the railroad company became indefeasible, lacking only performance of the conditions of the grant, if not already performed, to enable the company to demand and receive patents for all the land granted. The road, in fact, had

been completed in 1869 (R., Vol. 1, 30, 165), and the map of February 1, 1870, was filed and accepted on May 6, as the basis of adjustment of the claims of the company for land (R., Vol. 1, 325) before the listings to the State had been made, which occured from September 8, 1870, to March 24, 1873, (R., Vol. 1, 168–176 inc.).

XVIII.

The act of Congress of August 3, 1854 (10 U. S. Stats., 346, U. S. R. S., Sec. 2449), as to the listings to the State, "where said law does not convey the fee simple title of such lands or require patents to be issued therefor," but are transferred by certified lists of the Commissioner of the General Land Office, reads as follows:

> But where lands embraced in such lists are not of the character embraced by such act of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

Can it be said that these lands already granted, and appropriated to other uses, and withdrawn by competent authority from "sale, location, preëmption, and homestead," in conformity with the requirements and declared purpose of an act of Congress, and being at the same time "unsurveyed lands," are of the "character embraced by such act of Congress" of 1853, or are "intended to be granted thereby?" We think they are not of that character. The act of 1853 did not operate as a restriction upon the power of Congress to make subsequent grants of the national domain.

That act (of 1854) has several times been considered and applied by the courts, and on each occasion it was held that such listings were absolutely void, and that no title passed thereby. (*Sutton* vs. *Fassett*, 51 Cal., 16; *Rosecrans* vs. *Douglass*, 52 Cal., 215; *Patterson* vs. *Tatum*, 3 Sawyer, 170–71.)

In the last case cited the court, by Mr. Justice Field, held that the listings and State patent were both void, and said:

> This result would follow without any legislation to that effect, * * * but as if to preclude any possible discussion upon the question the act of August 3, 1854, was passed, etc.

Where, then, it may be asked, is the title to these lands at present? It seems to follow unquestionably that it is in the United States, who solemnly engaged to convey by patents that title to the railroad company upon certain conditions, which have been performed, and the engagement stands recorded in its act of Congress. The listings over to the State, complained of here, prevents the performance of that engagement. See Secretary Teller's letter of October 18, 1882, to the Commissioner of the General Land Office (R., Vol. 1, 199.)

Will it be seriously contended that the act of Congress of July 1, 1862, passed at the time of great national peril, to secure territorial integrity, has been defeated by force of the provisions of this general law of 1853, and that the power of disposal by Congress of the national domain was limited and conditioned by the provisions of that act of 1853, when no right under it had attached to this land at the date of Congressional action, the land not

being within the excepting clauses of the act of 1862–'64? Such, unquestionably, is the reach of the contention by appellants. If that contention be true, and it be the law, then an act of Congress disposing of the nation's property for the nation's uses and necessities, may be a vain thing, even though, as in this instance, no other right to it had accrued at the date of the act.

XIX.

The remedial or curative act of July 23, 1866, relied upon by appellants, did not effect these lands for the reasons: *First.* The lands had already been granted, appropriated, and reserved by act of Congress of 1862, and were therefore excepted from selection by the State. *Second.* The alleged selections, being made upon unsurveyed lands, were void, so that the intervening rights of the railroad company under the acts of 1862–'64 took effect upon the lands long before the listings to the State and before the act of 1866 was in existence. The prior and intervening rights of the railroad company attached to the land specifically upon the survey of the land by the United States.

The decisions of the United States Supreme Court in *Huff* vs. *Doyle* (93 U. S., 558); *Aurrecoechea* vs. *Bangs* (114 U. S., 381); and *Durand* vs. *Martin* (120 U. S., 370), fully sustain this view; also *Toland* vs. *Mandell* (38 Cal., 41); *Foscalina* vs. *Doyle* (47 Cal., 440, 441); *C. P. R. R. Co.* vs. *Yolland* (49 Cal., 438); *C. P. R. R. Co.* vs. *Robinson* (Id., 448).

XX.

The act of July, 1862, granted, appropriated, and in effect reserved the odd-numbered sections of land within the limits named in it, for the use and benefit of the railroad company, "not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed;" that is to say, all odd sections which were of the national domain, at the date of the grant, and of the filing of the map of the general route, December 8, 1864, and of the reception of the Secretary's order of withdrawal at the local land office at San Francisco on January 30, 1865, and also, such odd sections as should belong to the United States "at the time the line of the road is definitely fixed," within the limits named in the act, saving and excepting only lands then sold, reserved, or otherwise disposed of, and to which a preëmption or homestead claim may have attached between the date of the grant (July 1, 1862) and the date of filing in the local land office of the order of withdrawal on January 30, 1865.

There may be some antagonism in the provisions of section 3 and section 7 of the act, relating to the rights of preëmption and homestead claimants, after the withdrawal provided for in section 7, but as the contention here does not concern any preëmption or homestead claim, we pass its consideration.

It is sufficient to note the fact that State selections or locations are not within the exceptions of the grant; only land then sold, reserved, or otherwise disposed of, and

homestead and preëmption claims make the list of exceptions; certainly void selections of unsurveyed lands could not be "land disposed of." The terms of the grant are "universals," viz, "every alternate section;" the terms of exception are "particulars," viz, "a preëmption or homestead claim," etc., hence every odd-numbered section within the limits of 20 miles, not excepted, was granted.

We observe here that the part of section 7 of the act of 1862, providing for the withdrawal of the lands granted "from preëmption, private entry, and sale," is a provision purely *ex industria*, and was not needed to secure to the grantees any rights to which they were entitled under the act; but was probably intended for the protection of parties applying at the office of the register and receiver to purchase or to file homestead or preëmption claims upon lands already granted and appropriated, that they might, in season, be so advised. The act itself undoubtedly worked a reservation of the lands granted. (*Van Wyck* vs. *Knevals*, 106 U. S., 360; *Walden* vs. *Knevals*, 114 U. S., 373, above cited.)

However that may be, the withdrawal settles the question under discussion, that no listing over to the State of these lands could be made after the withdrawal, is evident.

That the Secretary of the Interior had unlimited power in his discretion to withdraw public lands from sale and other disposition, and did not need the authority of special statute so to do, given in the act, must, in view of the numerous and recent decisions be conceded, the most recent of which we are advised, being the case of George Herring, or of the Kaweah Colonists, by Secretary Noble, on July

18, 1890, relative to withdrawal by the Secretary, without the special authority of a statute, of land covered by Sequoia Gigantea trees, or "Big Trees Grove" in the United States Visalia land district of California. The Secretary holds that although there is no statute giving authority to the President to reserve lands, yet the right of the President to put public lands in reservation so that all questions in reference to them might be properly considered, has always been maintained by the courts. (Decisions. Dep't of the Interior Vol. X1, 61; *Grisar* vs. *McDowell*, 6 Wall., 363, 381; *Wolsey* vs. *Chapman*, 101, U. S., 755; *Graham* vs. *So. Pac. Rwy. Co.*, 5. L. D., 332.)

The President of the United States as the Chief Executive, acting through his subordinates, the Secretary of the Interior and the Commissioner of the General Land Office, had ample power to withdraw these lands in controversy from every manner of disposal that would defeat the provisions of a preëxisting act such as the act of July 1, 1862, which in terms appropriated them to the specific use and purpose; and it was his duty so to do—to see that the law was duly executed and given effect. The power of the President is both executive and administrative.

The general supervisory and appellate powers given to the Commissioner and Secretary, in the *Act of April* 25, 1812 (2 U. S. Stat., 716), establishing the General Land Office; the *Act of July* 4, 1836 (5 U. S. Stat. 107), reorganizing that office, the *Act of March* 3, 1849 (9 U. S. Stat., 395), establishing the Department of the Interior, and Section 453 Revised Statutes, all imply the existence of

this power and duty. (*Bernards' Heirs* vs. *Ashley's Heirs*, 18 How. 43; *Grisar* vs. *McDowell*, 6 Wall. 380, 381; *Hestres* vs. *Brennen*, 50 Cal. 211; *Vance* vs. *Kohlberg*, *Id.* 346.)

XXI.

In further consideration of the alleged State locations and listings pleaded here, the facts relative thereto, shown by the record, and the conditions and limitations of such locations and the mode of acquiring title to public lands by the State, we call attention to the testimony of Charles H. Chamberlin (R., Vol. I, 126–128, inc.), receiver in the United States Land Office at San Francisco, and to the testimony of Duncan McNee (R., Vol. 1, 128–135, inc.), clerk in that office, and to the testimony of John F. Swift (R., Vol. I, 135–138, inc.), the register of said office from early in 1864 to September, 1866, all to the effect that the State location entries in "Tract book 11," must be considered as forgeries, placed there unofficially and without authority of law. We invite the especial attention of the court to the testimony above cited.

The entries are in the handwriting of Leander Ransome, who was, at their dates, the State locating agent for San Francisco district, and was ever persistent in his endeavor to make State selections of unsurveyed lands. (See Swift's testimony.)

That such selections were never made at the dates of the entries in the tract book is evident from the testimony above referred to. Even if made at those times they are valueless, having been made upon unsurveyed lands.

That the entries were made as an afterthought subsequent to their apparent date, is, we think, too plain for denial.

The testimony of McNee (R. Vol. I, 129,130), the clerk above referred to, shows that the State selections in sections 17, 19, and 21 in township 3 south, 13 east, were invalid for the additional reason that section 36 in township 17 south, range 13 east, in lieu of which these selections were made, was public land at the time they were made, and was not "reserved for public uses or taken by private claims," and so had not been lost to the State; therefore were not made "in lieu thereof" as provided in section 7 of the act of March 3, 1853; but were null and void (*Rosecrans* vs. *Douglas*, 52 Cal., 215; *Aurrecoechea* vs. *Sinclair*, 60 *Id.* 550); nor does the testimony of record show that the selections, township 2 south, 1 east, were made in lieu of lands lost to the State; if so made, it should so appear. The mere general assertion of loss in the answer is insufficient; nor were these selections cured or validated by the act of 1866, being by its terms excepted therefrom, and for the additional reason that the rights of third parties had intervened, before its passage.

XXII.

The rights of the appellants, if any they have, to the lands in controversy here, depend primarily upon whether they were surveyed lands at the dates of selections. It does not appear from the record that they were such at those dates. Selections of unsurveyed lands by the State were utterly null and void.

No question seems to have been more definitely settled than this by numerous decisions of the supreme court of California, and of the United States supreme court. (*Terry* vs. *Megerle*, 24 Cal. 609 ; *Grogan* vs. *Knight*, 27 Cal., 515 ; *Middleton* vs. *Low*, 30 *Id.*, 604 ; *Smith* vs. *Athern*, 34 *Id.*, 512 ; *Toland* vs. *Mandell*, 38 *Id.*, 31–41 ; *Hasting* vs. *Devlin*, 40 *Id.*, 363 ; *Collins* vs. *Bartlett*, 44 *Id.*, 380; *Hastings* vs. *Jackson*, 46 *Id.*, 243 ; *Young* vs. *Shinn*, 48 *Id.*, 26 ; *Chant* vs. *Reynolds*, 49 *Id.*, 217 ; *Central Pac. R. R. Co.* vs. *Robinson*, 49 Cal., 446 ; *Aurrecoechea* vs. *Sinclair*, 60 *Id.*, 549 ; *Huff* vs. *Doyle*, 50 Cal., 21 ; *Roberts* vs. *Columbet*, 63 *Id.*, 24; *Bernards Heirs* vs. *Ashleys Heirs*, 18 How., 46 ; *Aurrecoechea* vs. *Bangs*, 114 U. S., 383.)

In *Central Pacific Railway Co.* vs. *Robinson*, above cited, it was also held that the odd-numbered sections of land within the boundaries of a Mexican grant rejected after the passage of the acts of Congress of July 1, 1862, and July 2d, 1864, could not be selected as lieu lands ; but that these odd sections passed to the Central Pacific Railway Company, and that the act of 1866 did not confirm to the State listings of land granted to the Central Pacific Railroad Company of California. (Also *Central Pacific Railway Co.* vs. *Yolland*, 49 Cal., 438 ; *Kaiser* vs. *McLaughlin*, *Id.*, 451, 452 ; *United States* vs. *McLaughlin*, 127, U. S., 426.)

We submit that the final survey of the Las Pocitas was the same in effect as rejection in *Kaiser* vs. *McLaughlin*, since that both relieved the land of claim and all uncertainty, making in one case all the land, and in the other

all outside the final survey, Government land. It is immaterial, therefore, in view of the foregoing decisions and the recent decision in *United States* vs. *McLaughlin*, whether or not the lands in contest were included within the outboundaries of the land claimed under the Las Pocitas Mexican grant, as contended by appellants; it is sufficient that these lands were outside the limits of the final survey of the lands actually granted, and therefore, not reserved from disposal by Congress.

XXIII.

Again we advert to the fact that there is no evidence that these lands were "surveyed lands" prior to the State selections. There is no evidence that the township maps or plats of survey had been approved by the surveyor-general and filed in the office of the register of the United States district or local land office at San Francisco, as required by law, prior to the selections or locations.

Appellants only say that of township 3 south, 3 east, a survey in the field was made in December, 1862 (Rec., Vol. I, 40, 41), and only on information and belief, that a plat of that survey was filed in the United States local land office at San Francisco prior to the dates of these selections. No evidence was offered to support that alleged belief.

The law requires such survey to be transmitted to the register of the local land office.

No survey at all is claimed or shown to have been made of township 2 south, 1 east, prior to the selections in June, 1865.

Lands could not be treated or affected as "surveyed" until the township plats or maps of survey had been filed in the office of the register. (*Bernard's Heirs* vs. *Ashley's Heirs*, 18 How., 145; *Huff* vs. *Doyle*, 93 U. S., 560; *Terry* vs. *Megerle*, 24 Cal., 647; *Grogan* vs. *Knight*, 27 *Id.*, 519, 520; *Megerle* vs. *Ashe*, 33 *Id.*, 82–91; *Hastings* vs. *Devlin*, 40 *Id.*, 364; *Pope* vs. *Athern*, 42 *Id.*, 617; *Collins* vs. *Bartlett*, 44 *Id.*, 382; *Hastings* vs. *Jackson*, 46 *Id.*, 239; *Young* vs. *Shinn*, 48 *Id.*, 27; *Rooker* vs. *Johnson*, 49 *Id.*, 3; *Aurrecoechea* vs. *Sinclair*, 60 *Id.*, 543; *Bode* vs. *Trimmer*, 82 *Id.*, 515; *Aurrecoechea* vs. *Bangs*, 114 U. S., 383; 1 Lester, 723, Title XVII, "Survey of Public Lands.")

Also, Secretary Schurz's decision in the Townsend case. (Exhibit O, Rec. Vol. 1, 195.)

The above decisions follow the requirements of the law. Subdivision "fourth" of section 2223, Revised Statutes, defining the duties of the surveyor-general, reads as follows:

> Fourthly, he shall transmit to the registers of the respective land offices within his district general and particular plats of all lands surveyed by him, for each land district, and he shall forward copies of such plats to the Commissioner of the General Land Office. (Also see sec. 2395, Rev. Stat. sub., "Eighth.")

The reason of the law requiring the filing of the survey in the office of the register of the local land office is readily apparent upon consideration. It is at that office that the public lands are offered and disposed of to purchasers and others entitled thereto; hence, in that office

should be found the evidence of the fact that the lands offered are public lands, having been surveyed, and are disposable and salable.

The doctrine that the lands are "surveyed" immediately when the lines have been run in the field is not law and does not rest upon reasonable grounds. If such were the law, a deputy surveyor in the field and the surveyor-general's office would be masters of the situation, and great injustice and scandals might follow from favoritism; early information might be both salable and profitable.

By the decisions and the rules and regulations pertaining to the survey of public lands by the General Land Office having the force of law, above cited, "surveyed lands" are such only when:

(1) They have been surveyed in the field and the proper boundaries and marks established.

(2) When this survey in the field has been approved by the surveyor-general.

(3) When the approved survey has been constructed into triplicate township plats, one of which is to be retained in the surveyor-general's office.

(4) When one of said plats has been returned to the General Land Office; and,

(5) When one of said plats has been furnished to the register of the local land office.

The foregoing are the prerequisites necessary to exist, and to have been done, before the lands of the United States become "surveyed lands" (*Tubbs* v. *Wilhoit*, 138 U. S., 134, 143).

How else could the provisions of the laws of California relative to the public land to which the State is entitled be complied with and given effect by the State's locating agent, or how could the United States registers of the land districts furnish him with the required lists if no record of the United States surveyed lands had been filed in their respective offices? Could they furnish them on hearsay evidence of a survey?

The provisions referred to are found in the sections of the acts of California legislature in 1858 and 1861, hereinbefore mentioned, and given in the appendix.

XXIV.

Now, as to the invalidity of these State selections and that respondents are not purchasers in good faith from the State, because of noncompliance with the State laws as to location, referred to in our statement.

The record shows that these selections and locations were made by the State at the instance and request of the respective appellants, upon lands unsurveyed by the United States, and being then a portion of the national domain; this action was taken under the authority of an act of the State of California (Stats. 1861, p. 218, see Appendix), which provided the mode and manner by which such locations should be made. To relieve the hardships arising under this authorized State law, the *Congressional act of July* 23, 1866 (14 U. S. Stats., p. 218), was passed.

Sec. 1 thereof reads as follows, viz:

> That in all cases where the State of California has heretofore made selections of any portion of the public domain * * * and has disposed of the same

to purchasers in good faith under her laws, the lands so selected shall be and are hereby confirmed to said State.

There is no evidence that these selections by the State of California were made in conformity with the State law of 1861, above cited. Therefore the appellants are not "purchasers in good faith under her laws." (See *Toland* vs. *Mandell*, 38 Cal., 38–42, 43.)

It was there held that the application to locate lieu lands must be accompanied by a map and field notes of the land sought to be purchased, surveyed, in accordance with the United States surveys, by the county surveyor of the county in which the land should be situated.

There was the same holding substantially in *Roberts* vs. *Columbet* (63 Cal., 25). Both decisions are to the effect that locations by the State of land unsurveyed by the United States must have been made in accordance with the provisions of the State laws; otherwise they could not be considered to have been sold to purchasers in good faith under the laws of the State, and, therefore, did not come within the purview of the remedial act of July 23, 1866. It does not appear by the record that the State's laws, in the respects mentioned, were at all regarded in these locations.

The intent and purpose of the act of July 23, 1866, was undoubtedly to cure and validate certain imperfect selections and listings of lands to the State made prior to its date, not excepted by the conditions and terms of the act itself. That it was efficient to that end, in proper cases where other rights of third parties had not intervened and attached to the lands illegally listed, previous

to the date of the act, may be admitted; but if other rights had so intervened and attached then said act was inoperative as to such lands.

We claim that the act was inoperative to effect the validation of the listings of the lands in contest here. The State selections, being made of "unsurveyed lands" and of lands previously granted and appropriated, were null and void. The order of withdrawal on December 23, 1864, then took effect and protected the odd sections against subsequent selection, until surveyed. The grant to the Railroad Company, by the act of July 1, 1862, took effect specifically upon these lands, at their survey, if not immediately at its date, and before the act of July 23, 1866, existed. The railroad company is a third party whose rights intervened between the dates of the void selections and the remedial or curative act of 1866, as hereinbefore stated.

The proviso in the first section of the curative act of July 23, 1866, reads as follows:

> *Provided*, That no selection made by the State contrary to existing laws shall be confirmed by this act for lands to which any adverse preëmption, homestead, or other right has, at the date of the passage of this act, been acquired, * * * or to any lands which have been reserved for naval, military, or Indian purposes by the United States, or to any land held or claimed under any valid Spanish or Mexican grant.

It seems evident that the lands in contest were intentionally excluded from the operation of the act, in order that it might not conflict with the acts of July 1, 1862, and July 2, 1864.

Certainly, at the date of the act of 1866, "other right" to these lands under an existing law had accrued by the act of July, 1862, if selections of unsurveyed lands, and of lands already appropriated and granted, were void, even if they did not fall within the reservations of section 1 of the act of 1866 as lands reserved for "military purposes * * * to secure the safe and speedy transportation of the mails, troops, munitions of war," etc.

Was not the condition of the Government and country in 1862 such as to fairly support this view? (*United States* vs. *Union Pacific Railway Company*, 1 Otto, 79; *Platt* vs. *Union Pacific Railway Company*, 9 Otto, 48–67.)

That the lands in contest were claimed under a valid Mexican grant at the date of the act of July, 1866, the record here fully shows.

Nor did appellants acquire any rights to these lands by section 4 of the act of July 1, 1864, amendatory of the act of July 1, 1862, which provides that the act "shall not impair or defeat any preëmption, homestead, swamp land, or other lawful claim, nor include * * * the improvements of any bona fide settler."

The claim of appellants was not a lawful claim such as placed these lands in the category of "lands otherwise disposed of by the United States," under section 3 of the act of 1862.

A lawful claim is one which in some manner connects itself with the paramount source of the title. (*W. P. Rwy. Co.* vs. *Tevis*, 41 Cal. 489; also the recent case *McLaughlin* vs. *Minotti*, 89 Cal., 354.) No such connection is shown here. The appellants neglected to assert

their privilege to be treated as preëmptors upon unsurveyed lands; therefore it is that the record does not show that they became bona fide settlers having a lawful claim.

XXV.

The respondents' right of selection of public land under the act of March 3, 1853, being a statutory right and not a right of common law, the remedial act of July 23, 1866, will be strictly construed. (*State of Cal.* vs. *Craycroft*, 2 Cal., 243; *Ward* vs. *Severance*, 7 *id.*, 129, and cases therein cited; *Same* vs. *Poulterer*, 16 *id.*, 531; *Wiley* vs. *Yale*, 1 Met., 553; *Rex* vs. *Wright*, 1 Bur., 543; *Rex* vs. *Robinson*, 2 Bur., 803; *The Andover M. T. Co.* vs. *Gould*, 6 Mass., 42; *Renwick* vs. *Morris*, 7 Hill, 576; *Lang* vs. *Scott*, 1 Black., 405; *Almy* vs. *Harris*, 5 Johns., 175.)

Respondents neglected to avail themselves of the provisions of the act of 1866, section 3, and so took nothing by it.

Section 3 of that act provides that in case selections have been made upon lands which have not been surveyed by authority of the United States:

> Upon the filing, with the register of the proper United States land office, of the township plat (of survey) in which any such selection of unsurveyed lands is located, the holder of the State title shall be allowed the same time to present and prove up his purchase and claim under this act as is allowed preemptors under existing laws, and if found in accordance with section 1 of this act the land embraced therein shall be certified over to the State by the Commissioner of the General Land Office.

The power of certification by the Commissioner is plainly conditioned upon compliance with the terms of that section, if the land sought for is not excluded by section 1 of the same act.

There is no evidence that the respondents ever complied with this section 3 of that act.

The testimony of Chas. H. Chamberlin, receiver, and Duncan McNee, principal clerk, and the objections thereto, in their nature an admission, made at the taking of the testimony by Mr. Crane, attorney for appellants, seems conclusive. (R., Vol. I, 127, 128, 130.)

We can hardly believe that the attorneys for appellants do seriously contend that the provisions of section 3 of the act of July 23, 1866, taken in connection with the instructions received by the local land office from the General Land Office, cited and appearing in the record here (R., Vol. I, 127), relative to the proofs as preemptors required in cases arising under that act and section, have been at all complied with. Will a presumption "that the proofs were taken at the General Land Office in Washington," and "that such proofs were found to be satisfactory there," as claimed by Mr. Crane, be sufficient to set aside the express provisions of the act and the definite instructions of the Department, without any evidence whatever in the record to show that such proofs were ever made at the General Land Office in Washington, even if they would have been lawful and sufficient when so made? The Commissioner of that office is not clothed with the power of taking the proofs of preëmptors. Neither the act of April 25, 1812, creating the General Land Office, nor the act of July 4, 1836, reorganizing it,

nor any other act confers that power upon him; that duty and power is, by section 3 of the act of May 29, 1830, granting preëmption rights, and also by section 12 of the act of September 4, 1841, definitely given to the register and receiver of the land district in which the land sought for may lie.

The authority of the General Land Office, that of the Commissioner and Secretary of the Interior, is only appellate and supervisory.

If the appellants ever had any right to these lands in contest, they lost them by disregard of the act of 1866 and noncompliance with its remedial and plain provisions. (*Doll* vs. *Meador*, 16 Cal., 326; *Toland* vs. *Mandell*, 38 Cal., 43; *Hildebrand* vs. *Stewart*, 41 *id.*, 387; *Collins* vs. *Bartlett*, 44 *id.*, 371; *Woods* vs. *Sawtell*, 46 *id.*, 389; *Bottsford* vs. *Howell*, 52 Cal., 158; *Aurrecoechea* vs. *Sinclair*, 60 *id.*, 547–551; *McCoy* vs. *Byrd*, 65 *id.*, 92; *Rhodes* vs. *Borden*, 67 *id.*, 7.) They not only disregarded the United States act of 1866, but also the State laws of 1858 and 1861, as has been already shown.

In *Aurrecoechea* vs. *Sinclair* it is held that—

> The plaintiff admits that the State's selection was void (it being made of unsurveyed land), and that by it alone he acquired no right. He has, therefore, no equitable right to the land unless the alleged selection and location have been recognized and ratified by the provisions of the act of 1866, and he has shown such a compliance with its terms and conditions as entitled him to the benefit of the act.

The decision in *Huff* vs. *Doyle* (93 U. S., 558) also seems to have settled this point. It was there held, the

plaintiff Huff having previously made selection of unsurveyed land and, twelve days after the plat of the United States survey had been filed in the local land office, having offered proof of his purchase and claim under said section 3, that he had complied with the law and that his right and title to the land was good. Will it be said that if Huff had offered no proof that still his title would have been equally good? (Also *C. P. R. R. Co.* vs. *Yolland*, 49 Cal., 444.)

It was also held in *Huff* vs. *Doyle* that, by a fair construction of the acts of 1853 and 1866, selections of lands, "held or claimed under a valid Mexican or Spanish grant," must be determined as of the date when the claimant under a State selection undertakes to prove up his claim after surveys have been made and filed, and within the time allowed thereafter to preëmptors; but the record shows no proof or offer of proof at any time.

The act of March 3, 1853, under which appellants claim title, section 6, first proviso, relative to preëmption of unsurveyed lands, reads as follows:

> *Provided*, That when unsurveyed lands are claimed by preëmption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices, and proof and payment shall be made, etc. (U. S. Stats., vol, 10, p. 238.)

All the acts relative to preëmption by settlers from May 29, 1830 (4 U. S. Stat., 420) to the present time contemplate and provide for the taking of proof to establish the rights of claimants by the register and receiver of the local land office in the district where the land is situated.

Appellants should have offered proof as preëmptors. It is only reasonable that one claiming benefits under a remedial act should comply with its conditions. (*Bagnell* vs. *Broderick*, 13 Peters, 436; *Barry* vs. *Gamble*, 3 How., 32; *Rector* vs. *Ashley*, 6 Wall., 142; *Frisbie* vs. *Whitney*, 9 Wall., 187.)

Section 3 of the act of July 23, 1866, gives power to the Commissioner to certify land to the State not excepted by its terms, and which was unsurveyed when selected, only when the United States survey had been completed by filing a township plat in the local land office, and when proof had been made by claimants as preëmptors.

XXVI.

Notwithstanding the law, a certification or listing over of these land was somehow had by the Commissioner of the General Land Office at Washington. By what authority of law, the statutes and the records here fail to disclose. The local land office of the district within which the lands are situated, at San Francisco, was entirely ignored, and no proof was offered, seemingly with the intention to escape notice and prevent opposition from persons holding adverse title, derived from the railroad company.

We submit that this action of the Commissioner was against the section of the act above cited, and was wholly unauthorized and illegal, and the listings so made are without effect, other than the necessity for this action. (*Durand* vs. *Martin*, 120 U. S., 370.) This omission of proof deprived the Commissioner of the power to cer-

tify the lands to the State. It was so held in the *The Secretary* vs. *McGarrahan* (9 Wall., 298), where there was a similar omission of proof, under section 7 of the same act, and also that mere assertion of purchase in good faith without proof was insufficient.

These lands had been previously appropriated and reserved and withdrawn from market to answer the calls of the grant to the railroad company, and that fact was public and well known to the appellants and to the officials of the Land Department.

There was written in red ink across the face of the map or plat of survey of township 3 south, 3 east, it being an official record of the Land Office at San Francisco on December 28, 1865, the date of filing therein, the words, "The odd numbered sections on this plat are granted to the Western Pacific Railroad Company. See letter of instructions dated December 23, 1864." (Comp. Exhibit X, R. vol. 1, 200).

The map of survey of township 2 south, 3 east, Mt. D. B. & M., it is agreed was filed in the local land office at San Francisco on the 16th day of June, 1865, across the face of which was also written in red ink the words, "The odd-numbered sections on this plat are granted to the Western Pacific Railroad Company. See letter of instructions dated December 23, 1864." (Resp. Exhibit 12, R., Vol. I, 260.) These inscriptions show that there was no lack of knowledge in the United States Land Office of the fact that these odd sections of land in contest had already been granted, and so were not subject to selection by the State, and also that they were unsurveyed

when located not later than June 13, 1865 (R., vol. 1, 256, Resp's Ex. 7). These township survey plat books were accessible official records, and were notice to all persons concerned, such as forbids that appellants are *bona fide* purchasers from the State without notice. (*Aurrecœchea* vs. *Sinclair*, 60 Cal., 547–551).

The testimony of Charles H. Chamberlin, the receiver, distinctly states (R., Vol. I, 128) that the railroad company would have been summoned if any proof as preemptors had been offered or filed. Why, we may be allowed to ask, was the law ignored, and no proof offered in the local office, and the listing over to the State furtively obtained at Washington?

The Commissioner, in his certificates of recommendation to the Secretary for approval, indorsed on them the usual recommendation that it was made "subject to any valid interfering rights which may have existed at the date of selection." (R., Vol. I, 170, 172, 174, 176.) We think he also should properly have added the words, "and at the date of this certificate." The approval of the Secretary was also conditioned in the same manner (R., Vol. I, 170, 172, 174, 176).

The records of the Land Office and the statutes show that, at the dates of said recommendations and approvals, the lands included in those lists in contest here were odd-numbered sections and had been already granted and appropriated by the act of July 1, 1862, and had been withdrawn from sale, location, etc., by the very Department of which the Secretary was the head, acting under the requirements of section 7 of said act, and also that these lands were, at their dates of selection, unsurveyed lands, and

were then claimed as a portion of the Las Pocitas Rancho, as will hereinafter be shown. All these facts were, therefore, within the official knowledge of the Secretary and Commissioner.

The history of the action of the State of California, by her legislature and officials, during the period from 1852 to 1866, in the endeavor to assert the State's claim to Government land, ignoring the land laws and regulations of the United States, is both interesting and instructive, and throws light upon the condition of things shown in the record here. For that history we refer to *Toland* vs. *Mandell* (38 Cal., 30) and *Huff* vs. *Doyle* (93 U. S., 558); also to the testimony of Chamberlin, McNee, and Swift (R., Vol. I, 126–138, inc.).

The certified lists under which appellants claim these lands also bear the following certificates or statements:

> General Land Office * * *. The tracts embraced in the following list have been critically ("carefully" in one certificate) examined and are found to be free from conflict and to inure to the State for the purpose indicated.

These certificates are signed, variously, by B. T. Reilly, J. J. Barnes, and M. Mobley (R., Vol. I., 168, 170, 172, 174).

In view of the evidence of record, above referred to, it is evident that the certificates of these gentlemen, who were presumably clerks in the General Land Office at Washington, are untrue in every essential particular. The tracts of land were not "free from conflict;" they could not have been "carefully examined," nor did the lands "inure to the State."

The granting act of 1862, the order of withdrawal of December 23, 1864, with the accompanying map on file in the General Land Office at Washington, and in the local land office at San Francisco, and the inscriptions on the township plats, were notice to all concerned, and especially to the officials of the General Office, that these lands had been already appropriated and granted to the railroad company, and withdrawn from other disposal for its benefit. Certificates so utterly at variance with the facts of record in their own office, as are the certificates mentioned, surely can have no adverse effect upon the rights of others.

The grantees of the act of 1862 and those holding under them were entitled to their "day in court" before their claims to these lands should have been adjudged, set aside, and ignored. That they should have been heard is manifest by section 3 of the act of July 23, 1866. What other purpose can have been contemplated by the language used, relative to proof, than the rights of third parties, if any, might be considered and protected? How else than by the proof, as provided for, could the Commissioner know that the lands which he was asked to certify to the State were not lands excepted by the act itself?

Considering all the facts of record, by what authority of law, we ask, did the Commissioner certify these lands to the State of California—lands already granted and reserved, of which the Commissioner had full knowledge?

XXVII.

We also say that the State selections of these lands could not in any case have taken effect upon them, nor

could the title to them have passed from the United States until the date of certification and listing over to the State by the Commissioner in the years 1870 to 1873. (R., Vol. 1, 168–176.) Previous to these dates these lands were a portion of the national domain, subject to disposal by Congress.

The title to public lands does not pass from the control of the Government, under general laws, and become indefeasible until the payment of the price or until the delivery of the certified list in the case of State application for lieu lands; meanwhile other rights may accrue and control the final disposition of the land. Until the listing over by the Commissioner the rights of locators are equitable only and of no effect as against a grant by the United States. (*United States* vs. *King*, 3 How., 773; *Hooper* vs. *Scheimer*, 23 How., 235; *Irvine* vs. *Marshall*, 20 How., 558; *Frisbie* vs. *Whitney*, 9 Wall., 187; *The Yosemite Valley Case*, 15 Wall., 77; *Act of August* 3, 1854, 1 Lester, 236, No. 249; *Wisconsin R. Co.* vs. *Price Co.*, 133 U. S., 496; *St. Paul, etc., R. Co.* vs. *Winona, etc., R. Co.*, 112 U. S., 720, 731; *People* vs. *Shearer*, 30 Cal., 645; *Hutton* vs. *Frisbie*, 37 Cal., 493; *Collins* vs. *Bartlett*, 44 *Id.*, 382; *Hodap* vs. *Sharp*, 40 Cal., 73; *Hastings* vs. *Jackson*, 46 *Id.*, 243, 244; *Foscalina* vs. *Doyle*, 47 *Id.*, 440; *Buhme* vs. *Chism*, 48 *Id.*, 471, 472; *Chant* vs. *Reynolds*, 49 *Id.*, 217; *Grand Gulf R. and B. Co.* vs. *Bryan*, 8 Sm. & M., 268; *Phelps* vs. *Kellogg*, 15 Ill., 135; *Brown* vs. *Hughes*, 9 Mo., 261; *Opinion Attorney-General Speed, of May* 9, 1866.) Other opinions of Attorneys-General might be cited to the same effect.

It is the rule of the Land Office to note on the township plat in that office any State selection only where the land has been listed over by the Commissioner. (R., Vol. I, 132, McNee's testimony.) Even then the listing to the State is but prima facie evidence of right or title; other evidence may overcome the presumption and show the listing to be unauthorized and of no effect. (*Durand* vs. *Martin*, 120 U. S., 366; *Rosecrans* vs. *Douglass*, 52 Cal., 213.)

XXVIII.

We ask the attention of the court to the recent decision of the supreme court of California in *McLaughlin* vs. *Minotti* (89 Cal., 354), before cited, which seems to cover the controlling points of this case and to fully sustain our views expressed herein, to the effect *that* the Congressional act of 1862–'64 passed a present interest in the lands designated therein, needing only location of the route of the road and survey to make the grant specific; *that* under section 7 of that act the route of the railroad was definitely settled, so that the grant attached when a map approved by the directors designating the route of the proposed road was filed with the Secretary, and no adverse right could be initiated between the time it was so filed and the time when the notice or the order withdrawing the lands was received at the local land office; *that* the withdrawal precluded the initiating of any other right to the land; *that* an application for the purchase of school land made before survey of the United States is void; *that* the lands having been disposed of by the act of 1862–'64 the Land

Department had no jurisdiction to transfer them, and its listings thereof to the State was inoperative and void; *that* the act of July 23, 1866, does not apply to lands so previously granted; *that* Congress could not, after acceptance by the company of the act of 1862–'64, divest it of its rights to these lands; *that* one who enters upon public land without complying with the laws providing for acquisition of the title is not possessed of a lawful claim within the meaning of section 4 of the act of 1864, reserving from its operation such a claim; so that appellants, not having properly alleged or offered any proof to show that these selections were made in lieu of land lost to the State, and having also neglected to avail themselves of the provisions of section 3 of the act of 1866 to make proof as preëmptors and so put themselves in privity with the source of title, have no lawful claim, and are not *bona fide* purchasers from the State.

Lieu lands can be acquired under the act of 1853 only by the establishment of certain precedent facts; that act is at most, as to such land, a grant *in futuro* and takes effect only when those facts exist, and appear in the records of the United States local land office. The very nature of so-called lieu-land selections, and the necessity for the previously existing fact of loss to the State, of the sixteenth or thirty-sixth section in place, the uncertainty that any particular section will be designated, all forbid that it is a present grant.

XXIX.

We now come to the consideration of another branch of this case raised by the defendants (appellants here) "sepa-

rate defence" (R. Vol. pp., 35, 36, 37), wherein they allege that complainant ought not to have or maintain this suit against them, for the reason that the lands in contest were reserved from the operation of the grant to the railroad company to answer the calls for land granted to Noriega and Livermore by the Mexican Government in 1839, called Las Pocitas.

In answer to this allegation we say, *in limine*, that the land reserved for the Mexican grant named, as against disposal or grant by the United States, is in its proximity to the lands in contest, just 1 mile distant from the nearest parcel of them (Comp's Ex. FF., "compiled map," and appellants' Ex. Hopkins, R., Vol. II), as decided by this court in *United States* vs. *McLaughlin* (127 U. S., 426). The lands in contest are outside of the extremest of limits of land possible to have been reserved as being a portion of that Mexican grant shown by the so-called Lewis survey in 1854, and established by the Department of the Interior in the St. Clair case and other cases, as fixing the outboundaries of the land granted under that name, all as will on consideration of the facts of record fully appear. It will not be denied that the lands in contest were claimed as a part of this Mexican grant up to June 26, 1879, the date of Secretary Schurz's affirmation of the Commissioner's refusal to grant a rehearing on an appeal from his decision of March 9 previous, holding that the Lewis survey of 1854 represents the exterior boundaries of the Las Pocitas rancho, and awarding the odd-numbered sections outside the Lewis survey to the Central Pacific Railway Company (including the lands in

contest here), and instructing the register and receiver to make a request for relinquishment of title by the State authorities of these lands erroneously listed over. (R., Vol. 1, 181–191, inc.)

The appeal was taken by W. D. English, an attorney, in behalf of himself and co-owners of the State title, and as attorney for the State of California (R., Vol. I, 65, 66). This affirmation by the Secretary, as the record shows, closed the period of contention, as to the quantity and boundaries of the land granted, called Las Pocitas, during which period the matter was *sub judice* in the Land Department, and was long after the listings to the State in 1870, 1871, 1873 (R., Vol. 1, 168–176, inc.).

Section 6 of the act of March 6, 1853, expressly excepts from its operation "lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands." The lands "appropriated under the authority of this act" are the sixteenth and thirty-sixth sections in place, definitely granted, and the act undoubtedly took effect upon them when they had become surveyed lands by the United States survey (*C. P. R. R. Co.* vs. *Robinson*, 49 Cal., 446; *Fenny* vs. *Berger*, 50 *id.*, 248; *Rosecrans* vs. *Douglass*, 52 *id.*, 213; *Medly* vs. *Robertson*, 55 *id.*, 396).

Section 7 of the same act provides indemnity for such sixteenth and thirty-sixth sections as have been lost to the State by reason of settlement, reservation for public uses, or taken by private claims, and that other land shall be selected in lieu thereof agreeably to the act of the 20th

of May, 1826; but section 2 of that act requires that such indemnity selections be made "out of any unappropriated public land within the land district where the township for which any tract is selected may be situated."

The answer here nowhere asserts nor does the testimony show any compliance with the conditions of that section, but the bill and the testimony does assert and show that these lands listed to the State by the Commissioner had been, for a long time previously, appropriated and reserved by the Congressional act of 1862, and withdrawn from disposal by the order of the Commissioner on December 23, 1864, long before the listings to the State by the Commissioner. Surely these selections in contest were not made of lands "unappropriated," but were made of lands already granted by Congress to another use, and so appropriated. Selections of such lands by the State were unauthorized and illegal, and could not be cured by the remedial act of 1866 as against the intervening rights of the grantees in the Congressional act mentioned.

The extent and boundaries of the lands claimed under this Mexican grant, Las Pocitas, finds its expression in the so-called Dyer survey of that grant made in 1865, at the instance of the heirs and successors of the grantees, and ordered and made by the Land Department after final confirmation of the grant by the United States Supreme Court as a final survey of the land claimed to have been granted and confirmed by the decree of that court. (Resp.'s exhibits 27, 28, 30, and 43, inc., R., Vol. I, 290–305, inc.; Vol. II, Resp. Ex. 29.) And generally (R., Vol. I, 278 to 305, inc.) where the history of this grant appears in full.

The claim that this Dyer survey of 1865 showed correctly the land really granted by the name Las Pocitas to Noreiga and Livermore was urged with great vigor by the claimants, and seemingly with a good degree of reasonableness owing to the somewhat uncertain language of the grant itself. We call attention to the letter of Mr. Edward J. Pringle, "attorney for claimants," to L. Upson, surveyor-general, exhibit 30 (R., Vol. I, 80, 295), to be considered in connection with respondent's exhibits 27, 28, 29, 31, 32 (R., Vol. I, 291–298, inc.), and "Exhibit Hopkins" and "compiled map," complainant's exhibit FF (R., Vol. II), also to B. B. Newman's appeal in the St. Clair case, in July, 1873 (R., Vol. I, 232–243, inc.), where the claim to all the land embraced in the official survey by Dyer in 1865, is urged with much vigor and vehemence.

The contest about the boundaries of the Las Pocitas rancho was, several years before the commencement of this action, finally settled and adjudicated by the Land Department of the United States, a tribunal having the power to hear and determine mixed questions of law and fact pertaining to the public lands, just such as were presented before it in the case *Arthur St. Clair* vs. *The Western Pacific Railroad Company*, above mentioned, wherein, after a prolonged contest, this very grant, Las Pocitas, and this very contention about its boundaries was under consideration; and it was then and therein decided by the register, Rollins, and by the Commissioner, Drummond, that the so-called Lewis survey thereof, in 1854, marked the exterior limits of the concession, and so was a full and

ample delineation of the land granted and possible to be reserved (R., Vol. 1, 216–231, inc.).

This decision was affirmed by the Secretary, Delano, on appeal (R., Vol. 1, 244), and the contention finally settled by Secretary Schurz on June 26, 1879 (R., Vol. I, 190, 191), as before mentioned.

The Lewis survey contained over 4 leagues, more than double the quantity of land actually reserved, as now appears by the decision of this court in the *United States* vs. *McLaughlin et al., supra.*

There was the same holding by the Department subsequently in *State of California* vs. *The Central Pacific Railroad Company,* and *State of California* vs. *Townsend* (R., Vol. I, 181–198 inc.).

We therefore say that the determination of this question of uncertainty and fixing, under decree, the boundaries of reservation under the grant Las Pocitas by that tribunal was final, and that this court will not consider it here. It is *res adjudicata,* and all the testimony introduced by appellants in their endeavor to now extend the boundaries of the grant and reservation of land beyond those fixed by the tribunal, was properly objected to as immaterial and inadmissible: (*Allen* vs. *Blunt,* 3 Story, 744; *Maguire* vs. *Taylor,* 1 Black, 195; *Polk's Lessees* vs. *Wendell,* 9 Cranch, 98, 99; *United States* vs. *Commissioner,* 5 Wall., 563; *Gaines* vs. *Thompson,* 7 Wall, 347; *The Secretary* vs. *McGarrahan,* 9 Wall., 298; *Johnson* vs. *Towsley,* 13 Wall., 72; *Marquez* vs. *Frisbee,* 101 U. S., 473; *Steel* vs. *Smelting Co.,* 106 U. S., 447; *Smelting Co.* vs. *Kemp,* 104 U. S., 636; *Shiply* vs. *Cowan,* 91 U. S., 330; *French* vs. *Fyan,* 93 U. S., 167; *Moore* vs. *Robins,* 96 U. S.

530; *Vance* vs. *Burbank*, 101 U. S., 541; *Quimby* vs. *Conlan*, 104 U. S., 420; *Doll* vs. *Meador*, 16 Cal., 314; *Yates* vs. *Smith*, 38 Cal., 60.)

This determination was arrived at by the decision of the register of the local land office at San Francisco, affirmed by the Commissioner of the General Land Office, and approved by the Secretary of the Interior, and was clearly within the jurisdiction of the Department. Who else could, under the decree of confirmation, fix on the ground the boundaries of a Mexican land grant? The St. Clair case appears in the record here (R., Vol. I, 216–244, inc.), and shows that Livermore, the grantee, soon after the confirmation of his claim by the board of land commissioners, early in the year 1854, he then being the sole owner of the Las Pocitas grant (R., Vol. I, 121), thinking undoubtedly that the decision of the board was final, and not expecting an appeal by the United States, applied to the surveyor-general of California, J. C. Hayes, for a survey of his land granted and confirmed (R., Vol. I, 200). The surveyor-general, by his deputy, William J. Lewis, made such survey in the month of May of the same year under the direction and in the personal presence of Livermore himself and of the adjoining land owners, as shown in Surveyor Lewis's "return" of the survey. (See exhibits BB, CC, DD, EE, FF above referred to in St Clair's case, R., Vol. I, 200–216, inc., and Vol. II, exhibits DD, EE, FF.)

The Lewis survey of 1854 was made by authority of law, as an initiatory or preliminary survey, whatever might have been the expectations of Livermore, as to it

being final. That he considered it to be final, is probable. The power to make it was lodged in the discretion of the surveyor-general of California for the evident purpose of enabling that official to make an approximate segregation of the lands of the United States from the Mexican land grants awaiting confirmation in the interest of settlers upon Government land. (See act of Congress of August 31, 1852, 10 U. S. Stats. 91, R. S., Sec. 2223, Sub. "Third.") We call attention to the decisions of Register Rollins and Commissioner Drummond (Comp's Ex. GG, HH), where a full history of this grant and its surveys is given (R., Vol. I, 216–231, inc.), and ask that they be considered in connection with exhibits CC (R., Vol. 1, 202–211, inc.), and DD, EE, FF (R., Vol. II, Nos. 5, 6, 7, in order), and also with the testimony of Mr. J. H. Wilde (R., Vol. I, 121, 122), all relating to the quantity and extent of land granted and reserved. Exhibit FF is a compiled map of all the surveys, showing their comparative size and relation to each other, and the surrounding topography.

These exhibits and testimony show that the Lewis survey is a large and excessive delineation of the land reserved, under the rule established in such case, in *United States* vs. *McLaughlin* (*supra*), to answer the calls of this grant, and contained within the deseño filed with the petition for confirmation. (Ex. KK, R., Vol. 1, 278, 279, and Vol. II.) The topography of the Whitney geological map (Ex. EE, Vol. II) shows conclusively that the Lewis survey covers the valley lands to the bases of the surrounding hills, and fully corroborates the substantial correctness and fairness of that survey.

Lewis, in his "return" and field notes accompanying the map of his survey, under the head of "General observations" (R., Vol. I, 210), says that when he suggested to Livermore that "the calls in the grant might perhaps authorize the running of the eastern boundary along the summit, instead of at the base of the mountain," he (Livermore) replied that "he asked no such construction," but, "on the contrary, he expressed himself entirely satisfied with the boundaries as I surveyed them and as represented in the accompanying map." (Complainant's Exhibit DD, R., Vol. II, being the fifth exhibit in order.)

We are not to be understood as saying that the Lewis survey of 1854 was final or conclusive either upon the Government or upon Livermore, or upon his successors in interest, in asserting later their full rights and claims to land under the grant and decree of the Supreme Court, but that such survey was made by the surveyor-general for the purpose and by the authority before stated. It could in no way prejudice Livermore's rights to more land if the final decree of the Supreme Court had been that the grant included all the land within the boundaries named in the act of grant itself, and shown on the deseño (Vol. I of R., 278–280), and embraced by the so-called Dyer survey of 1865, as was stoutly claimed by the appellants, instead of two leagues only. (*Biddle Boggs* vs. *Merced M. Co.*, 14 Cal., 366–373, inclusive.)

XXX.

Just what value is to be ascribed to this Lewis survey may be in some doubt, it having been a preliminary or initiatory survey, made before final confirmation.

Seemingly the largest consideration that can be given it is, that it marks the widest possible limits of the land *reserved* to answer the calls of the grant as held by the Land Department. But the recent decision of this court in *United States* vs. *McLaughlin et al.* (*supra*) holds that only the land *granted* is reserved, and that the *surplus* land lying within the limits of a claimed tract subject to a Mexican "float" grant is at the disposal of Congress, "provided a sufficient quantity lying together be left to satisfy the grant." It was in effect also so held by Judge Crockett in *Yates* vs. *Smith* (38 Cal., 60), also in the recent case of *Grant* vs. *Oliver* (91 Cal. 158). In this case at bar the land actually reserved is the tract of two leagues embraced by the final survey of March, 1869, 8,880 acres, and patented to the owners, and found inside the larger tract, of compact form, "lying together," of more than double the quantity requisite to satisfy it (20,846.7 acres) shown by the Lewis survey. (See Exhibits 41, 42, 43, R., Vol. I, and DD, EE, FF, R., Vol. II.)

It is evident, therefore, that land may be claimed and yet not be reserved—land claimed and land reserved are separate and distinct classes of land. This distinction is clearly recognized in *Aurrecœchea* vs. *Bangs* (114 U. S., 383), where it is held that the land claimed to be within a valid Mexican grant is within the excepting clause of section 1 of the act of July 23, 1866, and that a State selection of such land is void, although the land selected may on final survey have been excluded from the grant, and that a holder under an invalid State selection has the same rights as a preëmption settler upon the unsurveyed lands,

and no more. Also, *C. P. R. R. Co.* vs. *Yolland* (49 Cal., 439), and *Same* vs. *Robinson* (49 *Id.*, 446), where it is held that lands so claimed and excepted from the act of 1866 were not reserved from the grant to the railroad company of 1862–'64.

It will not be denied that the lands in contest here were claimed as a part of the Las Pocitas grant, by the heirs and successors of Livermore, immediately after final confirmation and the filing of the mandate of the United States Supreme Court in the district court allowing claimants to proceed as under final decree. (R., Vol. 1, 289.) Thereupon the Dyer survey of 1865 was ordered and duly made by the Department, not as a survey of the exterior boundaries of a tract within which the lesser specific quantity granted "a float" was to be located, but as the final survey of the land granted, confirmed, and claimed by and under the decree (R., Vol. I, 290–294); and until the final disposition of the matter of boundaries in 1879 by Secretary Schurz, as hereinbefore shown, it stood as the authorized and official survey of the tract of land claimed to have been granted, called Las Pocitas, and embracing all the lands in contest here.

The testimony of appellants as to the extent of the land claimed to be a part of that grant is definite, clear, and abundant. The contention was vigorous and persistent, that the Dyer survey of 1865, embracing nearly ten leagues, showed the real claim and grant. (R., Vol. I, 216–244 inc., 290–296 inc.) In *Huff* vs. *Doyle* (93 U. S., 564), before cited, it was held that:

> It is not to be denied that the facts show that at the date of act of 1866, the land claimed by the defend-

ants (E. ½ sec. 24, T. 3 S., R. 2 E., and included within the outboundaries mentioned in the decree of confirmation and the Dyer survey of 1865) was a part of the tract of land claimed under a Mexican grant (this same grant Las Pocitas) and that the grant itself was then and is still considered to be a valid grant.

Also *Durand* vs. *Martin* (120 U. S., 366) where this survey is spoken of as showing the "boundaries of the claim."

No one of these appellant locators under the State offered to prove up his claim within the time allowed to preëmptors, or at any time after final surveys had been made and filed, relieving the land from further claim as a portion of said rancho so as to bring the matter within the rule laid down by this court in *Huff* vs. *Doyle* (*supra*), as to the necessity of proof as a preëmptor, within the period of three months allowed by law after return to the local land office of the township survey. (Lester I, 358).

XXXI.

Notwithstanding the adoption by the Department of the Dyer two-league survey of 1869 as the correct survey of Las Pocitas, we find as late as May 25, 1878, that Mr. William D. English "on behalf of himself and coöwners of the title to State of California to said lands involved in this matter," etc., appealed from the decision of the Commissioner and made application for rehearing by the Department, in the case, the "Central Pacific Railroad Company in the application of said company to obtain patents to certain odd-numbered sections," etc. (R., Vol. I, 65, 66, 319–324), supported by the affidavits of La

Croze, a surveyor, and Hiram Bailey, a son-in-law of Livermore, the grantee, then deceased and a part owner.

Said application was based upon the alleged facts that the Lewis survey of 1854 did not show the boundaries of the grant Las Pocitas correctly, nor did it include all the land granted, but that the Dyer survey of 1865 did show the true extent of the claim, and the land granted contained within the boundaries mentioned in the decree of confirmation, and shown by the deseño. This claim to all the land covered by the survey of Dyer in 1865 was made at a time when the owners of the grant had an undoubted right to make it; in fact, it was the first time when the claim for land, by officially declared limits of metes and bounds, courses and distances, could properly have been made. The decree of confirmation did not establish those limits on the ground. This official survey by Dyer in 1865 (R., Vol. I, 290–295 inc.), made immediately after final confirmation and decree, purported to do that. The boundaries of the grant were then for the first time, under the departmental action, directed and governed by the decree of the Supreme Court; and it was contended that this survey was made in strict accord with that decree. (Attorney Pringle's letter to Upson, surveyor-general, R., Vol. I, 295.) It was in support of the Dyer survey that the testimony of appellants' witnesses, Hopkins, Dyer, Kottinger, and S. B. Martin, in this case was adduced (R., Vol. I, 83–118 inc.).

Their testimony was to the effect that the Dyer survey of 1865 showed the land granted and actually contained within the boundaries set forth in the grant and decree.

The claim for land, asserted by the Dyer survey of 1865, was for nearly 10 square leagues, or 43,011.33 acres, as it appears on the map of that survey (appellants' Ex. 29, No. 13 in order), the claimants urging that the language of the final decrees, as also of the grant itself, warranted the construction that all the land embraced by the Dyer survey of 1865, and claimed to be within the exterior limits mentioned in the grant to Noreiga and Livermore, and shown by the deseño, was intended to be, and was granted by the Mexican Government (R., Vol. I, 290–296 inc.), and that it should be included in the survey and be patented to them. The contention was certainly not without plausibility and it was undoubtedly real. The quantity at stake was large, over 34,000 acres or thereabouts of valuable land, being the difference between the two leagues finally confirmed and patented and nearly 10 leagues claimed.

These facts determine the extent and quantity of land claimed as a part of said grant, while the matter of extent and boundaries of this Mexican grant was still *sub judice*. The land actually reserved, in cases like this, as against disposal by the Government, has been recently defined and fixed by the court in *United States* vs. *McLaughlin* before cited, being the land granted and shown in this case by the final survey. (R., Vol. II, Comp. Ex. FF, "Compiled Map," and Appellants' Ex. Hopkins), being the seventh and seventeenth in order in that volume.

The grant Las Pocitas is a "float," as that term is defined in *United States* vs. *McLaughlin;* it is for 2 leagues of land if found within the larger exterior boundaries

named. (R., Vol. I, 278–280.) The land reserved was the 2 leagues granted, found and shown by the final survey to be within the lines of the Lewis survey, a body of land lying together amply sufficient to satisfy the grant, it being something more than double the quantity requisite. (See Exhibit FF and Exhibit Hopkins, above mentioned, R., Vol. II.)

The Secretary of the Interior rejected the Dyer survey of 1865, as being excessive, and ordered a new survey to be made which should contain only the two leagues of land granted. (R., Vol. I, 297.) A new survey was duly made and the quantity was found by the same surveyor (Dyer) to be inside the four-league survey of Lewis in 1854, as above stated, saving a small fraction of an acre (forty-five one-hundredths, as is shown by a certificate of the United States surveyor-general of California, in our possession, but not shown in the record, and which evidently occurred by following the line of the smallest subdivision of Sec. 36, T. 2 S., R. 2 E. (a 40-acre lot) of the United States survey of public lands adjoining, immediately outside of the Lewis survey. A mere glance at the map (appellant's Ex. Hopkins, R, Vol. II) makes this apparent; also, "compiled map" (Comp. Ex. FF, R., Vol. II.)

From the foregoing facts can there be any doubt that the "Lewis survey" marks the extremest out boundaries possible of the lands "*reserved*" and that the Dyer survey of 1865 marks the boundaries of the lands "*claimed*" as Las Pocitas under final decree? This is the view held by Register Rollins in the St. Clair case, approved by Commissioner Drummond, and affirmed by Secretary Delano (R., Vol. I, 216, 231, inc., 244). The contention of

appellants that these lands were reserved from grant by Congress is not tenable, but the fact that they were claimed as a portion of a foreign Mexican grant at the various dates of selection and listing to the State is indisputable, and that being so claimed they were expressly excepted from the operation of both the acts of 1853 and 1866, sections 6 and 1, respectively. Unless those sections be set aside and disregarded the commissioner had no power to list these lands to the State.

The remedial act of 1866, section 1, by its first proviso expressly excludes from its operation any land held or claimed under a valid Mexican or Spanish grant "at the date of the passage of this act." If these selections, made of unsurveyed lands under the act of March 3, 1853, were void when made, it follows that, if they were subsequently in effect made good by the act of 1866, it was by force of its provisions; but by the terms of that act these lands were excluded, being claimed as a part of the Mexican grant Las Pocitas, until June 26, 1879, as before shown. The remedial power of the act of 1866 to make good the State selections of land void at the date of the act will not be extended contrary to and beyond its own terms. Such acts will be strictly construed when the act is invoked to cure neglect or disregard of the provisions of a statute conferring a right, and not of the common law, as has been hereinbefore stated.

XXXII.

Appellants introduced in evidence a map (Exhibit 56, R., Vol. II, No. 16 in order), filed in the General Land Office on February 27, 1873, by the railroad company,

after the completion of the road, showing outlined thereon the "Dyer Survey" of the Las Pocitas Rancho made in 1865, and they argue therefrom recognition by the railroad company of the validity and correctness of that survey as showing the limits and boundaries of land claimed and reserved under said grant Las Pocitas.

In reply we say that the certificate on that map, signed by the president, Leland Stanford, S. S. Montague, chief engineer, and E. H. Miller, jr., secretary, all officers of the Central Pacific Railroad Company, declares its only purpose and significance, which was to show the definite and exact location of the line of the road as really built, and possibly to be used in aid of the settlement with the Land Department of the claims of the company for the land granted to it; and that the presence on that map of any survey or outline of any one of the numerous ranches shown by name on it (seventeen in number) is no evidence of their correctness. There are other seeming outlines of survey shown upon it, the meaning of which can only be conjectured; also lines of roads and trails, and numerous places by name, and creeks and water courses. This map in its topography is simply a copy of Prof. Whitney's geological map, which had been published by him shortly before, Prof. Whitney being at that time State geologist. (See testimony of J. H. Wilde, R. Vol. I., 121–123, inc.; also, maps referred to in Wilde's testimony, Ex. DD, EE, FF, R., Vol. II.)

The map of February 1, 1870 (Appellants' Ex. No. 47, R. Vol. II, No. 13 in order), also shows the lines of the the so-called Dyer survey of 1865. Why the map of 1873

was filed in addition to that of 1870, both being seemingly essentially the same, may be in some doubt, but an examination of the certificates of the railroad company's officials appearing on the maps probably solves the mystery, if any. The certificate of the map of 1870 certifies the line of the W. P. Railroad as "located and constructed," but does not certify the line of the road as "definitely fixed" as is provided in section 3 of the act of July 1, 1862. The map of 1873 supplies that omission. It was evidently to cure that defect that the later map was prepared and filed. We, therefore, again say that the presence on these maps, or on either of them, of a delineation of the excessive and rejected Dyer survey of 1865 is no evidence of the correctness of that survey, nor does it in the least affect the rights of the railroad company or of those holding title under it.

Odd sections outside of the Lewis survey of 1854, and within the Dyer survey of 1865, other than these lands in contest, were awarded to the railroad company by the land department (R., Vol. I, 181–191, inc.) as late as January, 1878 (R., Vol. I, 192–198, inc.).

THE PRIOR EQUITY.

There now remains to be considered the question of prior equity, suggested at the hearing in the court below.

The prior equity here is that raised by the grant to the railroad company in the act of Congress of July 1, 1862.

"The right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections, as were settled upon prior to the survey, reserved for public uses,

covered by grants made under Spanish or Mexican authority," etc., as is provided in section 6 of the act of July 23, 1866, construing the act of March 3, 1853, did not exist previous to the act of 1866, as therein given.

Section 6 of the act of March 3, 1853 (the third proviso) reads as follows, viz:

> *Provided*, That nothing in this act shall be construed to authorize any settlement to be made on any public lands not surveyed, unless the same be made within one year from the passage of this act.

That time was extended two years by the *Act of March 1, 1854* (10 U. S. Stat., 268), to March 1, 1856. The right of settlement upon unsurveyed lands under law had expired before the date of selections and certificates of purchase issued by the State in this case.

The act of March 3, 1853, also provides (sec. 7) that such selections shall be made "agreeably to the provisions of an act of Congress approved on the 20th of May, 1826, entitled "An act to appropriate lands for the support of schools" (4 U. S. Stat. 179). The act of 1826 reads, section 2:

> That the aforesaid tracts of land shall be selected by the Secretary of the Treasury out of any *unappropriated public* lands, etc.

But these lands in contest were not so selected by the Secretary of the Treasury, nor by his successor, the Secretary of the Interior (substituted by sec. 7 of act of 1853). On the contrary, the selections were made upon lands already appropriated and granted.

Section 7 of the act of 1853, also reads, viz:

> And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority.

The record shows that the lands in contest had been so reserved, before selection and listing to the State, by the act of Congress and the withdrawal by the Secretary.

The first proviso of the first section of the act of July 23, 1866, reads as follows:

> *Provided*, That no selection made by said State contrary to existing laws shall be confirmed by this act for lands to which any adverse preëmption, homestead, or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military, or Indian purposes by the United States, or to any mineral lands, or to any land held or claimed under any valid Mexican or Spanish grant.

The act of July 23, 1866, is amendatory and confirmatory of the act of March 3, 1853, which also (sec. 6) excluded from its operation land "reserved by competent authority," and excepting also, "lands claimed under any foreign grant or title and the mineral lands."

Considering these acts in their order and bearing upon each other, it is evident that no equity in behalf of the appellants could have begun earlier than the act of Congress of July 1, 1862, granting the lands in contest to the railroad company nor before the remedial act of July 23, 1866. The right or equity of the appellants, if any they

have, could only have commenced with the act of 1866; their selections previous to that date were void, having been made of unsurveyed lands already granted and appropriated, then, and also at the date of the remedial act of July 23, 1866, still claimed under a valid Mexican grant, and also of lands not selected by the Secretary of the Treasury [Interior] out of any unappropriated lands, as provided in the act of 1826, and long after March 1, 1856, the date when the right to make selections of unsurveyed lands expired. It may be conceded that legal selections in behalf of the State might have been made of unsurveyed lands up to that date, if made upon unappropriated lands selected by the Secretary of the Interior, but not otherwise. It is difficult to understand how any equitable right can have arisen by disregard of all the provisions of the several acts mentioned relating to State selections. A valid equity can not arise upon invalid, unauthorized, and void acts, such as were the State selections here. (*Aurrecoechea* vs. *Sinclair*, 60 Cal., 547, hereinbefore cited and quoted.)

Equity supplements and relieves the hardships and cures the deficiencies of the law, but it does not create the necessary valid act from which an equity springs; equity follows the law, but does not take its place. Courts of equity will not in an independent action relieve from mistakes of law, unless accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. (*Goodenow* vs. *Ewer*, 16 Cal., 471; *Boggs* vs. *Hargrave*, *Id.*, 566; *Story's Equity*, sec. 138; *Bank of the United States* vs. *Daniel*, 12 Pet., 55). No such circumstances exist or are shown by the record here.

It results, therefore, that the lands to be selected must have had the requisite selectable quality, else the appellants had no power to select them; nor had the officers of the Land Department power to list them over to the State of California, they being unsurveyed lands already appropriated to other uses and withdrawn from market and disposal, and not alleged in the answer to have been selected in lieu of any particular sixteenth or thirty-sixth section lost to the State, the testimony of McNee, principal clerk (R., Vol. I, 129, 130), positively showing that the selections in township 3 south, 3 east, were made in lieu of land *not* lost to the State, and there being no testimony that these selected lands were within the same land district as the sections for which the selections were made, as required by section 6 of the act of 1866. Even if appellants could claim an equitable right of title it is no defense against the United States. (*United States* vs. *King*, 3 How., 773.)

Whatever rights, if any, the appellants might have acquired by the act of July 23, 1866, they took *de novo*, as by an original grant (*Ryan* vs. *Carter*, 93 U. S., 78; also, Secretary Schurz in the *Townsend Case*, R., Vol. I, 198). There was no equitable right in them prior to that date. The act of 1866 did not purport to grant these lands anew; it was purely curative and remedial of a previous act. At its date there was no estate remaining in the United States subject to listing over to the State of California.

RÉSUMÉ.

As a résumé of our prolonged brief, we state the dates of importance shown by the record, and our points of contention, viz:

Date of the grant to the railroad company of the lands in contest, July 1, 1862, they being within the 10-mile limit. Date of filing in the Department of the Interior the map of the general route, December 8, 1864. Date of issuance of the order of withdrawal as provided by section 7 of the act of 1862, December 23, 1864. Date of filing in the local land office at San Francisco of the order of withdrawal, January 30, 1865. Date of filing the official map of the survey of township 2 south, 1 east, in the register's office, June 10, 1865. Date of filing the official map of survey of township 3 south, 3 east, in the register's office, nor earlier than June 4, 1869, or June 23, 1871, or July 1, 1871, as held in *Aurrecoechea* vs. *Sinclair* (60 Cal., 550). Date of filing the map definitely fixing the line of road, February 1, 1870.

We contend:

First. That the lands in contest were by the act of Congress of July 1, 1862, granted and appropriated to the use and for the purpose mentioned in section 3 of that act, and that they thereby became reserved from all other disposal.

Second. That by the order of withdrawal of the Secretary of the Interior, dated December 23, 1864, issued upon the filing in the Department of the Interior of the map of general route of the line of the road on December 8, 1862, and the reception and filing of the same in

the local land office at San Francisco on January 30, 1865, all lands within the limits of the acts of 1862–'64, including the lands in contest, which by the subsequent survey thereof by the United States became designated by odd numbers, not excepted by the acts themselves, were thereby also reserved and in terms withdrawn from sale, location, preëmption, and homestead, and it so appeared in the records of the General Land Office at Washington and on the township plats of survey in the local office at San Francisco, which records were public records and notice to all.

Third. That said lands having been so granted and appropriated under a special legislative act, and withdrawn and reserved by order of the Secretary, no steps or action under any general law, by which public lands might otherwise be taken, were sufficient to divert them from the special purpose for which they had already been set apart by Congress, during the period of time mentioned in the act itself, in which the conditions of the act might be performed, nor until they had been duly restored to the category of public land.

Fourth. That the grant in the act of 1862–'64 was a present grant which, upon performance of the conditions subsequent, took effect by relation, as of the date of the act, and so antedates all other possible rights and equities.

Fifth. That the rights of the railroad company, thus secured and protected, became specific as to the odd-numbered sections upon filing the maps or plats of the United States survey of the respective townships in the local land office at San Francisco on June 10, 1865, and on June 4, 1869, the latter date being the earliest date of the filing

in that office of the first map or plat of survey of township 3 south, deemed and held by the Department to be official, the map of December 18, 1865, filed December 28, 1865, not being considered official, all having been filed after the withdrawal of December 23, 1864, and filing thereof in the local office on January 30, 1865.

Sixth. That these selections by the State of California, they having been made of unsurveyed lands, no township plat of United States survey having been filed, or become a record in the local land office, as required by law, previous to selection, were absolutely null and void, and so continued to be until the railroad acts of 1862–'64 took effect upon the lands in question.

Seventh. That there is no sufficient evidence in the record that these selections were made in lieu of any sixteenth or thirty-sixth section of public land lost to the State, as alleged in the amended answer (R., Vol. I, 29), but the record does show that the thirty-sixth section, in lieu of which the selections were made in township 3, had not been lost to the State but was still public land (R., Vol. I, 129, 130), nor is it alleged in the answer or shown in the testimony that the selections were made in the proper land district, as required by section 6 of the act of 1866.

Eighth. That the remedial or curative act of July 23, 1866, did not validate these null and void selections for reasons, viz:

(*a*) These lands had already, before selection, been granted and appropriated, and so were reserved from selection or location by the State and were in terms excepted from the operation of the act.

(*b*) Even if no rights of the company had attached to the lands at the dates of the void selections, yet those rights did intervene and attach prior to the date of the act of 1866.

Ninth. That the act of 1866, section 1, by its terms excepted from its operation "any lands which have been reserved for naval, military, or Indian purposes by the United States." The grant to the company of 1862 stating it to be made "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon," was a military purpose. The act of 1866, section 1, also excepted "any land held or claimed under any valid Mexican or Spanish grant." These lands were, therefore, excepted from the remedial operation of the act, being so claimed.

Tenth. That the act of March 3, 1853, under which these State selections were made, also excepted from its operation "lands reserved by competent authority," also "lands claimed under any foreign grant or title;" so that these lands in contest here, claimed as a portion of the valid Mexican grant Las Pocitas, and so reserved while said claim was still *sub judice*, were excepted and could not be selected under it.

Eleventh. That the entries in Tract Book 11, of the indemnity lieu selections of these lands in contest here in the local land office, are false and of no effect.

Twelfth. That no evidence was ever offered or taken at the local land office at San Francisco to present and prove up the purchase and claims of respondents, allowed to preëmptors, as provided in section 3 of the act of July

23, 1866, and that therefore that act was inoperative as to the lands in contest, and respondents by noncompliance lost all rights, if any they had, to said lands.

Thirteenth. That the listing over to the State of California by the Commissioner was without authority of law, and void.

Fourteenth. That, in view of the law and the facts, the railroad company are entitled to patents for the lands in contest by reason of the Congressional act of 1862-'64, and the performance of its conditions, and that the listings of said lands to the State was illegal and void, and that they should therefore, by the decree of this court, be set aside, recalled, canceled, and annulled, so that patents may issue from the United States, as provided in the act of July 1, 1862, whereby the title to the lands, under the laws of California, will inure to the grantees of the railroad company.

Respectfully submitted.

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APPENDIX.

AN ACT amendatory of, and supplemental to, the act of April 23, 1858, and the act of February 18, 1859. (California Stats., 1861, p. 218.

[Approved April 22, 1861.]

SECTION 1. As soon as practicable after the passage of this act, the locating agent of each land district shall obtain a list from the United States registers of their respective districts of the sixteenth and thirty-sixth sections of full townships, and the fractions of such sections in fractional townships donated to the State by Congress for school purposes, which have not been sold to preëmptors under the provisions of the preëmption acts, and also a list of those which have been thus sold, and also a list of such lands as have been reserved, or are covered by private claims or grants, and for which the State is entitled to select other lands in lieu thereof. He shall also obtain a list of the lands sold under the act for the sale of the sixteenth and thirty-sixth sections, approved April 26, 1858.

SEC. 2. The sixteenth and thirty-sixth sections, and the fractions thereof, thus listed to the State, which have not been sold, shall be located and sold, in all respects, in the same manner, and on the same terms, and at the same price, as is provided in the acts to which this act is supplemental and amendatory, except as herein otherwise provided.

SEC. 3. In lieu of those sixteenth and thirty-sixth sections already sold by the General Government to the preëmptors, or which may be reserved or covered by private claims or grants, or which the State may acquire the right to relinquish or choose other lands in lieu thereof, other lands

shall be located and sold in the same manner and on the same terms, and at the same price, as is provided in the acts to which this act is supplementary and amendatory, except as is herein otherwise provided. The locating agent of each land district shall report to the surveyor-general the section or part of section, township, and range of the lands relinquished, and the same of the land selected in lieu thereof, together with the cause of relinquishment of said land, and the county in which are situated the lands relinquished, and the county in which others in lieu thereof are selected. * * *

SEC. 4. The application for the location and purchase of the lands described in section 3 of this act, shall set forth the particular sixteenth or thirty-sixth section, or part thereof, in lieu whereof the location is made, and the application of the locating agent to the United States register, which shall be in conformity to the rules of the General Land Office, shall always be for an amount equal to at least one-quarter section of land, which shall be located, whenever practicable, in the same county as the section is situate in lieu whereof it is taken. * * *

SEC. 5. The sixteenth or thirty-sixth section in unsurveyed whole, or fractional townships likewise granted to this State by Congress, which shall not have been preempted or reserved, and all other lands chosen in lieu of those which may have been preëmpted or reserved, shall be located and sold in the same manner as the other school lands heretofore described, except that the application to locate, when on unsurveyed lands, shall be accompanied by a map and field notes of the land sought to be purchased, surveyed in accordance with the United States surveys by the county surveyor of the county in which the land is situate, etc. * * *

SEC. 11. An act entitled: "An act to provide for the sale of the sixteenth and thirty-sixth sections of land donated to this State, for school purposes, by act of Congress

passed March 3rd, A. D. eighteen hundred and fifty-three," approved April twenty-eighth (twenty-sixth), eighteen hundred and fifty-eight, is hereby repealed. * * *

SEC. 12. All acts and parts of acts conflicting with the provisions of this act are hereby repealed. This act shall take effect and be in force from and after its passage.

AN ACT to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to this State for school purposes, etc.

[Approved April 23rd, 1858.]

[Stats. 1858, page 248. Not conflicting with, or repealed by, the act of April 22nd, 1861.]

SEC. 7. The locating agent shall prepare and keep a complete register of all lands located under the provisions of this act, containing a description of the same by sections, and parts of sections, township, and range, appended to the names of purchasers, in alphabetical order, and the county in which said lands are situated, and certify a copy thereof to the registers of the State land office.

SEC. 8. The said agents shall in like manner, in the name of the State, for the use of the particular township requiring such location to be made, locate lands in lieu of any sixteenth or thirty-sixth section, or parts of sections, appropriated by law of Congress to other uses * * * whenever thereunto requested by the person authorized by the board of supervisors of any county in this State, to select land in lieu of those otherwise appropriated; said agent to keep the like register and furnish the like reports as provided for in section 7 of this act, and also to the register of the land office, a complete and perfect description of the lands relinquished by section, township, and range, and the reasons why said lands were relinquished. * * *